TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 16, 1900.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

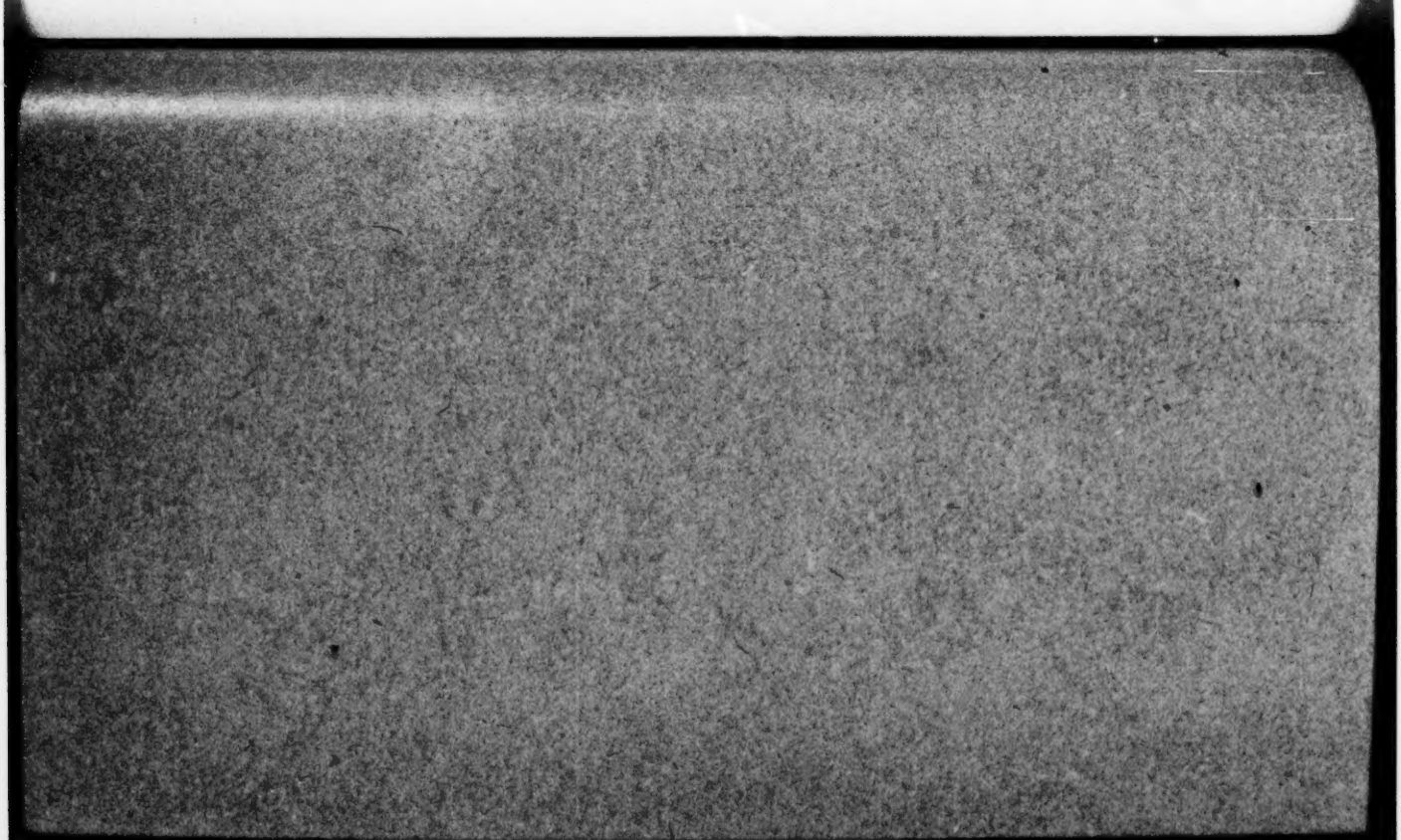
vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES R. LYNDE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED JULY 8, 1900.

(16,331.)



(16,331.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 552.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, EXECUTOR OF THE LAST WILL AND TESTAMENT OF CHARLES R. LYNDE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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a Supreme Court of Ohio.

THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
CHARLES R. LYNDE *et al.*

Error to the Circuit Court of Franklin County. No. 3570.

STATE OF OHIO,
City of Columbus, } *ss:*

To the honorable Supreme Court of the United States:

Pursuant to the command of your within writ of error, directed to us, we, under our seal, distinctly and openly, the record and proceedings mentioned within, with all things concerning the same, before the judges within named in a certain authenticated transcript to this writ attached, do send as within we are commanded.

In witness whereof I, Josiah B. Allen, clerk of the supreme court of Ohio, have set my hand and seal of said court this 3rd day of July, A. D. 1896.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk,*
By GEO. H. KOLKER, *Deputy.*

b UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Ohio, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, plaintiff in error, and The Long Island Loan and Trust Company, executor of the last will and testament of Charles R. Lynde, deceased, and others, defendants in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened,

c

to the great damage of the said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within — days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

July 1st, 1896.

d Copy.

In the Supreme Court of the United States.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY Company, a Corporation under the Laws of Pennsylvania, Ohio, Indiana, and Illinois, Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, a Corporation under the Laws of the State of New York, Executor of the Last Will and Testament of Charles R. Lynde, Deceased; The Columbus, Chicago and Indiana Central Railway Company, a Corporation under the laws of Ohio, Indiana, and Illinois; Archibald Parkhurst, Trustee; The Union Trust Company, a Corporation under the Laws of New York; The Farmers' Loan and Trust Company, a Corporation under the Laws of New York; The Pennsylvania Company and The Pennsylvania Railroad Company, Corporations under the Laws of Pennsylvania; W. N. Jackson, Trustee; Conrad Baker, Trustee; Frederick R. Fowler, and Joseph T. Thomas, Trustees, Defendants in Error.

Bond in Error.

Know all men by these presents that we, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, as principal, and David S. Gray, as surety, are held and firmly bound unto the defendant The Long Island Loan and Trust Company, executor of the last will and testament of Charles R. Lynde, deceased, in the

full and just sum of twenty thousand dollars, to be paid to the said defendant, The Long Island Loan and Trust Company, executor as aforesaid, its successors or assigns; to which payment, well
e and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 29th day of June, A. D. 1896.

Whereas lately, in the supreme court of the State of Ohio, in a suit depending in said court between The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, plaintiff in error, and The Long Island Loan and Trust Company, executor of the last will and testament of Charles R. Lynde, deceased, and others, a decree was rendered against the said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company in favor of the said The Long Island Loan and Trust Company, executor as aforesaid, and the said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company having obtained a writ of error in the Supreme Court of the United States to reverse the decree in the aforesaid suit:

Now, the condition of the above obligation is such that if the said The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company shall prosecute said writ of error to effect and answer all damages and costs if it fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
By J. T. BROOKS, *Vice-President.*

{Seal The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company. Incorporated, 1890.}

Attest: S. B. LIGGETT, *Secretary.*
DAVID S. GRAY. [SEAL.]

Sealed and delivered in presence of—
CHAS. E. BURR, as to D. S. Gray.

Witnesses to the signatures of J. T. Brooks and S. B. Liggett:
E. S. BEATTY.
L. L. GILBERT.

1 STATE OF OHIO, } ss:
Franklin County, }

David S. Gray, the subscriber to the foregoing bond, being duly sworn, deposes and says that he resides in the city of Columbus, Franklin county, Ohio, and is a householder in said city; that he is worth at least the sum of fifty thousand dollars over all his debts and liabilities and exclusive of property exempt by law from execution.

DAVID S. GRAY.

Sworn to before me and subscribed in my presence by the said David S. Gray this 29th day of June, 1896.

[Notarial Seal, Franklin County, Ohio.]

E. L. McCUNE,
Notary Public, Franklin County, Ohio.

This bond approved and to operate as a supersedeas of the decree appealed from July 1st, 1896.

JOHN M. HARLAN,
Justice Sup. Ct. U. S.

2 UNITED STATES OF AMERICA, *ss:*

To The Long Island Loan and Trust Company, executor of the last will and testament of Charles R. Lynde, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this first day of July, in the year of our Lord one thousand eight hundred and ninety-six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

3 On this sixth day of July, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared Joseph Lackner before me, the subscriber, a notary public in and for Hamilton county, Ohio, and makes oath that he delivered a true copy of the within citation to E. W. Kittredge, counsel for the Long Island Loan and Trust Company, this sixth day of July, 1896, at the request of Lawrence Maxwell, Jr., counsel for the plaintiff in error.

JOS. L. LACKNER.

Sworn to and subscribed the 6th day of July, A. D. 1896.

[Notarial Seal, Hamilton County, O.]

BEN. B. NELSON,
Notary Public, Hamilton County, Ohio.

4 Supreme Court of Ohio.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
CHARLES R. LYNDE, THE COLUMBUS, CHICAGO AND INDIANA CENTRAL Railway Company; Archibald Parkhurst, Trustee; The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, The Pennsylvania Railroad Company; W. N. Jackson, Trustee; Conrad Baker, Trustee; Frederick R. Fowler and Joseph T. Thomas, Trustees, Defendants in Error.

Record.

In error to the circut court of Franklin county, Ohio.

Watson, Burr & Livesay, attorneys for plaintiff in error.

Filed Jun- 14, 1893, in supreme court of Ohio.
J. B. ALLEN, *Clerk.*

5 Supreme Court of Ohio.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,
vs.
CHARLES R. LYNDE, THE COLUMBUS, CHICAGO AND INDIANA CENTRAL Railway Company; Archibald Parkhurst, Trustee; The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, The Pennsylvania Railroad Company; W. N. Jackson, Trustee; Conrad Baker, Trustee; Frederick R. Fowler and Joseph T. Thomas, Trustees, Defendants in Error.

Petition in Error.

Filed April 21, 1893.

Plaintiff says that in an action lately pending in the circuit court within and for Franklin county, Ohio, wherein the plaintiff in this action was plaintiff and the defendants herein were defendants, the defendant, Charles R. Lynde, by the consideration of said court at its January term, 1893, recovered a judgment against the plaintiff herein affirming a certain judgment of the court of common pleas of said Franklin county, wherein the said Charles R. Lynde was plaintiff and the said Pittsburgh, Cincinnati, Chicago and St.
6 Louis Railway Company and the defendants herein other than the said Charles R. Lynde were defendants.

Duly certified transcripts of the docket and journal entries in said cause in the courts below together with the original papers and pleadings are herewith filed.

Plaintiff says that in said judgment and proceedings in said circuit court there is manifest error to its prejudice in this, to wit:

First. The said court erred in affirming the said judgment of the common pleas court.

Second. The said court erred in not reversing the said judgment of the court of common pleas.

Third. The judgment of the said circuit court and its finding that there was no error in the record and proceedings of the common pleas court prejudicial to the plaintiff in error were contrary to law.

Fourth. Other errors apparent on the record.

Wherefore the plaintiff herein prays that the said finding and judgment of the circuit court and court of common pleas may be reversed and that the plaintiff herein may be restored to all things it has lost by reason thereof, and that this court make such other orders as may be right and proper in the premises.

WATSON, BURR & LIVESAY,
Attorneys for Plaintiff in Error.

The defendant, Charles R. Lynde, waives the issuing and service of summons in error in the above cause and enters his appearance therein.

CHARLES R. LYNDE,
Defendant in Error,
By KITTRIDGE, WILBY & SIMMONS,
His Attorneys.

7 STATE OF OHIO, }
County of Franklin. }

Court of Common Pleas.

CHARLES R. LYNDE, Plaintiff,
vs.
THE COLUMBUS, CHICAGO AND INDIANA CENTRAL RAILWAY COMPANY, a Corporation Organized under the Laws of Ohio; Archibald Parkhurst, Trustee; The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, a Corporation Organized under the Laws of Pennsylvania; The Pennsylvania Railroad Company, a Corporation Organized under the Laws of Pennsylvania; W. N. Jackson, Trustee; Conrad Baker, Trustee, and Frederick R. Fowler and Joseph T. Thomas, Trustees, Defendants.

Petition.

(Filed July 3, 1891.)

The plaintiff above named, Charles R. Lynde, says, that on or about the 1st day of November, A. D. 1864, the Columbus & Indianapolis Central Railway Company was a corporation duly organ-

ized under the laws of the State of Ohio, and had its principle place of business therein.

Plaintiff further says, that on or about the 1st day of November, A. D. 1864, the said The Columbus & Indianapolis Central
8 Railway Company made and issued its certain series of bonds, numbered consecutively from one to one thousand, inclusive, for one thousand dollars ($1,000) each; all of which bonds were duly signed by the president of the company and sealed with the corporate seal and attested by the secretary thereof; and each of said bonds was in the words and figures following to wit:

(One dollar revenue stamp.)

"No. 946. UNITED STATES OF AMERICA. $1,000.

The Columbus & Indianapolis Central Railway Company, States of Ohio and Indiana.

Second Mortgage Sinking Fund Bond.

Know all men by these presents, that the Columbus & Indianapolis Central Railway Company is indebted to William D. Thompson, of the city of New York, or bearer, in the sum of one thousand dollars, lawful money of the United States, which the said company promises to pay to him or to the bearer hereof on the 1st day of November, in the year one thousand nine hundred and four, in the city of New York, with interest thereon at the rate of seven per centum per annum, payable semi-annually in the city of New York, on the 1st days of May and November of each year on the presentation and surrender of the coupons hereto annexed as they severally become due, and in case of the non-payment of any half-yearly installment of interest which shall have become payable and shall have been demanded, if such default shall continue for six months after the maturity of the said installment, the principle of this bond shall become due in the manner and with the effect specified
9 in the deed of trust securing such payment. This bond is one of an issue of not exceeding $1,000,000, and has a special lien on all of the railway property, equipments and franchises of the said company, as mentioned in the deed of trust securing its payment, subject to prior mortgage liens of $3,200,000.

The holder hereof will also be entitled to the benefit and security of a sinking fund of five thousand dollars provided for and described in said deed of trust to be set apart annually for investment out of the earnings of said company for the redemption of the one million dollars secured by said deed of trust. This bond shall be transferable by delivery, or it may be registered as to its ownership on a registry to be kept by the company, and being so registered, it shall then be transferable only on the books of the company until released from such registry on said books by its owner. This bond shall not become obligatory until it shall have been authenticated by a certificate annexed to it, duly signed by the trustee.

In witness whereof, the said railway company has caused its corporate seal to be hereto affixed and the same to be attested by the

signatures of its president and secretary, and has also caused the coupons hereto annexed to be signed by its secretary, the 1st day of November, in the year of our Lord, eighteen hundred and sixty-four.

[SEAL.] G. MOODIE, *Secretary.*
B. E. SMITH, *President.*

COLUMBUS & INDIANAPOLIS CENTRAL RAILWAY COMPANY, OHIO AND IND.

I hereby certify that this bond is one of the series of bonds described in and secured by the deed of trust or mortgage above mentioned.

A. PARKHURST, *Trustee.*"

10 Plaintiff further says, that there were annexed to each of said bonds, coupons, payable to bearer semi annually in the city of New York, on the 1st days of May and November of each year on the presentation and surrender of the coupons so annexed, as they severally became due for each semi-annual installment of interest from and after the 1st day of November, A. D. 1864, to and including the 1st day of November, 1904.

Plaintiff further says, that the said coupons on each of said bonds for the interest coming due on the 1st day of May, A. D. 1865, was in the words and figures following, to wit:

"$35. *Second Mortgage Interest Warrant.* $35.

Due May 1st, 1865.

The Columbus & Indianapolis Central Railway Company will pay to bearer, in the city of New York, thirty-five dollars, being six months' interest on its bond.

No. —. G. MOODIE, *Secretary.*"

Plaintiff further says, that each of said coupons upon each of said bonds was in the same words, except that the date of maturity was the 1st day of May and November in each year until the maturity of said bonds and the number of the bond to which the coupon was attached was inserted in each coupon.

Plaintiff further says, that he is the owner and holder of thirty-six (36) of the said bonds hereinbefore described, to wit: Numbers 893, 894, 895, 896, 897, 898, 899, 905, 906, 907, 908, 909, 910, 914, 915, 916, 917, 918, 919, 920, 942, 943, 946, 948, 949, 950, 966, 967, 968, 969, 970, 976, 977, 978, 979, 980.

11 Plaintiff further says, that there are no credits or endorsements on any of said bonds or coupons; and that on the 27th day of August, A. D. 1878, the said bonds were duly registered by the defendant, The Columbus, Chicago & Indiana Central Railway Company in accordance with the provisions in said bonds contained and thereby made payable to this plaintiff and transferable by him.

Plaintiff further says, that on or about the 11th day of September, A. D. 1867, the Columbus & Indianapolis Central Railway Company was consolidated with the Union & Logansport Railroad Company and the Toledo, Logansport & *and* Burlington Railroad Company, under the laws of the State of Ohio, into and became the Columbus & Indiana Central Railway Company, which was a corporation thus organized under the laws of Ohio.

Plaintiff further says, that on or about the 1st day of February, 1868, the Columbus & Indiana Central Railway Company and the Chicago & Great Eastern Railroad Company were consolidated under the laws of the State of Ohio, into and under the name of the Columbus, Chicago & Indiana Central Railway Company, one of the defendants in this case.

Plaintiff further says, that by reason of said consolidation and under the laws of the State of Ohio, the said, The Columbus, Chicago & Indiana Central Railway Company became, and is liable for the payment of the bonds and coupons aforesaid, to the same extent as if such debts, liabilities and duties had been contracted by it; and the said defendant neglected and refused to pay each of the coupons upon each of said bonds from and including the 1st day of May, A. D., 1879, to and including the 1st day of May, A. D. 1891.

12 Plaintiff further says, that on the 1st day of May, A. D. 1891, this plaintiff commenced his action of law against the Columbus, Chicago & Indiana Central Railway Company in the circuit court of the United States for the southern district of Ohio, eastern division, being cause No. 560 on the docket of said court for the recovery of the amount due to him with interest upon each of the said semi-annual coupons attached to each of said bonds maturing and becoming due on the first days of May and November in each year from 1879 to and including the first day of May, A. D. 1891.

Plaintiff further says, that such proceedings were had in said cause as that at the June term, A. D. 1891, of said circuit court of the United States, by the consideration of said court this plaintiff recovered a judgment against the said The Columbus, Chicago & Indiana Central Railway Company for the sum of forty-two thousand nine hundred and ninety-seven dollars and seventy-five cents ($42,997.75) with interest thereon from the second day of June, A. D. 1891 and his costs in that behalf taxed at $88.65.

Plaintiff further says, that the said judgment still remains in full force unreversed and unsatisfied and that there is due from the said The Columbus, Chicago & Indiana Central Railway Company to this plaintiff thereon the said sum of $42,997.75, with interest thereon from the second day of June, A. D. 1891, and for the sum of $88.65 as costs in that behalf expended.

Plaintiff further says, that at the time of the consolidation of the said The Columbus & Indianapolis Central Railway Company, as hereinbefore set forth, the said The Columbus & Indianapolis Central Railway Company was the owner of and operating a railroad,

extending from Columbus in Franklin county, Ohio, to In-
13 dianapolis in Marion county, Indiana, and including the branch from Covington to Union and its franchises, equipment, property tolls and interests, that is to say the lands, tenements, hereditaments, fixtures, goods and chattels of said The Columbus & Indianapolis Central Railway Company, its property, rights, privileges, interest and estate of every description and nature, its rails, ties, fences, buildings and erections, its right of way, cars, engines, tools and machinery, its rents, reservations and reversions of every nature including all the property which the said defendant The Columbus & Indianapolis Central Railway Company then possessed with the benefit of all the contracts which the said company had made or by assignment or succession held.

Plaintiff further says, that by reason of the agreement of consolidation hereinbefore set forth and by the force and operation of the statutes of Ohio and Indiana in such case made and provided, a lien arose in favor of the plaintiff to secure the payment of the bonds and coupons thereto attached, upon all the property which the said The Columbus & Indianapolis Central Railway Company at the time owned and by virtue of said agreement of consolidation transferred to the consolidated companies; and that this plaintiff has the right to have the property of the said The Columbus & Indianapolis Central Railway Company so owned and transferred by it, applied to the payment of the judgment recovered by the plaintiff for and on account of the interest coupons heretofore matured recovered by this plaintiff as hereinbefore set forth; and to the payment of the coupons attached to said bonds as the same shall hereafter become due and payable, and to the payment of the principal of said bonds when the same shall have matured and become payable, according to their tenor.

14 Plaintiff further says, that at the time of the execution of the said bonds as hereinbefore set forth, the Columbus & Indianapolis Central Railway Company made and executed its certain deed of trust to the defendant, Archibald Parkhurst, as trustee, whereby it granted and conveyed to the said Archibald Parkhurst as trustee all of the said railroad and its property and franchises as the same are hereinbefore described to have and to hold the same in trust for the persons and corporations and for the benefit, protection and security of the persons or corporations who should hold the said one thousand (1,000) bonds issued by the said The Columbus & Indianapolis Central Railway Company, and for enforcing the stipulations of said company in that behalf in their intent and meaning, whether contained in said bonds or interest warrants or in the said deed of trust, whereby and by reason whereof a lien was created upon all of said property in behalf of this plaintiff to secure the payment of the bonds and the sums due and to become due upon the said interest coupons thereto attached, owned and held by this plaintiff as hereinbefore alleged, which deed of trust was at or about the date thereof duly recorded in the recorder's office in each of the counties in the State of Ohio through or into which said railroad was constructed.

And it is provided, however, among other things in said mortgage that the said trustee should not file a bill for the foreclosure and sale of said premises upon default in the payment of said coupons attached to said bonds or of said bonds as the same became due, unless the same should be requested in writing by the holders of at least three hundred (300) of the said bonds.

Plaintiff further says that the said defendant, The Columbus
15 & Indianapolis Central Railway Company, has paid or caused to be paid as the same matured the interest coupons upon more than seven hundred (700) of the bonds secured and intended to be secured by the said deed of trust and has made default in the payment of the coupons upon less than three hundred of said bonds whereby the holders of three hundred of said bonds are prevented and deterred from uniting with this plaintiff in requesting the said trustee to commence and prosecute an action for the foreclosure and sale of said property and premises.

Plaintiff avers that on or about the 27th day of June, A. D. 1891, at Newark, in the State of New Jersey, he, the said defendant, made a personal request and demand in writing of the said Archibald Parkhurst, as trustee, to commence an action for the foreclosure and sale of said premises in accordance with the provisions of said deed of trust, for and on account of the default made by the said The Columbus & Indianapolis Central Railway Company in the payment of the coupons held by this plaintiff as hereinbefore described; and this plaintiff then and there offered to the said trustee reasonable security and indemnity to protect him against all expenses and personal responsibility by him to be made and incurred in the commencement and prosecution of an action for the foreclosure and sale of said premises. That the said Archibald Parkhurst, as such trustee, then and there refused to take any action in the matter as requested by this plaintiff.

Plaintiff further says, that the said defendants, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, The Pennsylvania Railroad Company, W. N. Jackson, trustee, Conrad Baker,
16 trustee, and Frederick R. Fowler and Joseph T. Thomas, trustees, have or claim to have some interest in the property and premises hereinbefore described.

Wherefore plaintiff prays, that the said defendants and each of them may be required to answer and set forth what title or interest they may have in the property herein described. Plaintiff prays that a receiver may be appointed by the court to take possession of the property hereinbefore described and to hold and operate the same until the same shall be sold by order of this court. Plaintiff further prays, that the said premises and property may be decreed to be sold free and discharged from all claim or interest of the parties herein or either of them, and that the proceeds of said sale may be applied under the order of the court to the payment of the judgment heretofore recovered by this plaintiff against the said defendant, The Columbus, Chicago & Indiana Central Railway Company,

as hereinbefore set forth and to the payment of the interest coupons and the principal of the said bonds held by this plaintiff as the same shall become due and payable, and for all other proper relief in the premises.

KITTRIDGE & WILBY,
Plaintiff's Attorneys.

(Duly certified.)

17 *Answer and Cross-petition of the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.*

(Filed Oct. 14, 1891.)

Now comes the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, leave having first been obtained and for its answer and cross-petition, says:

First Defense.

Defendant denies that on or about the 1st day of November, or at any other time, the Columbus & Indianapolis Central Railway Company made or issued the entire series of bonds described in the petition or that any more than eight hundred and twenty-one bonds of the said series were ever made or issued; and says that none of the thirty-six bonds described in the petition as owned by the plaintiff were among the eight hundred and twenty-one so issued, and defendant says that none of the said thirty-six bonds were ever issued by the said Columbus & Indianapolis Central Railway Company or by any of its successors in the consolidations described in the petition. Defendant has no knowledge whether the remainder of said bonds were ever signed by the president of said company, or sealed with its corporate seal or attested by the secretary thereof as alleged in the petition. And this defendant for want of knowledge denies each of said allegations; defendant denies that plaintiff is the owner or the rightful holder of the thirty-six (36) of said bonds described in the petition or of any thereof.

As to the following allegations of the petition, to wit:

"That there are no credits or endorsements on any of said
18 bonds or coupons, and that on the 27th day of August, A. D. 1878, the said bonds were duly registered by the defendant The Columbus, Chicago & Indiana Central Railway Company in accordance with the provisions in said bonds contained and thereby made payable to this plaintiff and transferable by him."

This defendant has no knowledge and it therefore denies each of the said allegations. Defendant denies that by reason of the consolidations described in the petition or any of them, under the laws of the State of Ohio or otherwise the said The Columbus, Chicago & Indiana Central Railway Company became or is liable for the payment of the said thirty-six bonds or any of them or of the said coupons or any of them.

Defendant denies that in the action mentioned in the petition in

the circuit court of the United States for the southern district of Ohio, eastern division, such proceedings were had, that at the June term of said court or at any other time the plaintiff recovered a judgment against the said The Columbus, Chicago & Indiana Central Railway Company upon the said coupons or any thereof for the said sum of $42,997.75 or for any other sum.

Defendant says, that in said action on or about the 1st day of May, 1891, process of summons was issued for the said The Columbus, Chicago & Indiana Central Railway Company to the marshal of said district, who thereafter returned the same as served by delivering to G. Moodie, formerly secretary of said company, a true copy of said writ. That afterwards, on or about the 15th day of May, 1891, a second or alias writ of summons in said cause was issued against the said defendant corporation to the marshal of said district who thereafter returned the same as served upon said company by delivering a copy thereof to Gordon Moodie, as secretary and treasurer of the said company.

19 No other service of summons in said action was ever made upon the said railway company than as above set forth.

This defendant further says, that at the dates of said pretended service of summons the said Gordon Moodie was not and for many years had not been the secretary, treasurer or other officer of the said railway company. And the said The Columbus, Chicago & Indiana Central Railway Company was never served with summons in said action, and never appeared therein by attorney or otherwise.

Defendant denies that there is due the plaintiff from the said The Columbus, Chicago & Indiana Central Railway Company upon said pretended judgment, or upon said bonds or coupons the said sum of $42,997.75 with interest from the 2nd day of June, 1891, and the sum of $88.65 as costs in said action, or any other sum whatsoever.

Defendant denies that by reason of the consolidations described in the petition or any of them or by force or operation of the statutes of Ohio or Indiana or otherwise, a lien arose in favor of the plaintiff to secure the payment of the bonds or the coupons described in the petition and claimed to be owned by the plaintiff or any thereof upon the property then owned by the Columbus and Indianapolis Central Railway Company as alleged in the petition or any thereof, or that the plaintiff has the right to have any of said property applied to the payment of the said pretended judgment, or to the payment of any of said bonds or coupons not yet matured.

Defendant denies that by reason of the mortgage made by the said Columbus and Indianapolis Central Railway Company, a lien was created upon its said property or any thereof on behalf of the plaintiff to secure the payment of the said thirty-six bonds alleged to be owned by the plaintiff, or any thereof, or any of the coupons thereto attached.

20 *Second Defense.*

Defendant says, that none of the said thirty-six bonds or the coupons thereto attached were ever issued, negotiated, or sold by or on behalf of the said Columbus & Indianapolis Central Railway Company, or by or on behalf of any of its corporate successors into which by consolidation the said corporation became merged, nor sid the said Columbus & Indianapolis Central Railway Company or any of its said corporate successors ever receive any of the prodeeds thereof, or derive any benefit from the same; but after the said Columbus & Indianapolis Central Railway Compony had by cuccessive consolidations become merged into the said Columbus, Chicago & Indiana Central Railway Company, and on or about the month of May, 1878, the said bonds with the said coupons attached were, without the knowledge or consent of the said Columbus, Chicago & Indiana Central Railway Company abstracted from its possession by one B. E. Smith, and if the same or any thereof were negotiated or sold, it was done without the knowledge or consent of the said company as aforesaid.

Wherefore, defendant says, the said bonds and coupons were wholly without consideration, and were not and never became the obligations of the said Columbus, Chicago & Indiana Central Railway Company.

Third Defense and Cross-petition.

Defendant admits that on or about the first day of November, A. D. 1864, the said Columbus & Indianapolis Central Railway Company executed and delivered its certain mortgage or trust deed of that date to the said Archibald Parkhurst, trustee, for the
21 purpose of securing the payment of a series of one thousand bonds of one thousand dollars each, and the interest thereon as alleged in the petition. But the said railway company issued and sold eight hundred and twenty-one of said bonds and no more. None of the said thirty-six bonds described in the petition and alleged to be owned by the plaintiff were among the number so issued and sold.

Defendant further says, that on or about the 10th day of September, 1867, the said The Columbus & Indianapolis Central Railway Company was consolidated with the Union & Logansport Railroad Company, and the Toledo, Logansport & Burlington Railway Company into and became the Columbus & Indiana Central Railway Company. On or about the 12th day of February, 1868, the said The Columbus & Indiana Central Railway Company and the Chicago & Great Eastern Railway Company were consolidated into and became the said The Columbus, Chicago & Indiana Central Railway Company, one of the defendants herein.

On or about the 20th day of February, 1868, the said The Columbus, Chicago & Indiana Central Railway Company made its mortgage or deed of trust of that date to James A. Roosevelt and William

R. Fosdick, trustees, conveying to them all of its property including all that which formerly belonged to the said Columbus & Indianapolis Central Railway Company, described in the petition, for the purpose of securing the payment of fifteen thousand bonds of the said company, of one thousand dollars each, dated on the said 20th day of February, 1868, and due upon the 1st day of April, A. D. 1908, with interest at seven per cent. per annum, payable semi-annually.

By the terms of said mortgage, the maker thereof further
22 covenanted and agreed with said trustees and their successors, and with the holders of said bonds, to create and make a sinking fund for the redemption of said bonds by setting aside and depositing with a sinking-fund commissioner or commissioners to be appointed by said railway company for that purpose from and after the 1st day of April, 1870, and annually thereafter until the maturity of said bonds, from the net earnings of said road and property, an amount of money equal to the one-half of one per cent. of the principal—amount of all such bonds thereby secured, which should then be outstanding. Immediately thereafter, the said mortgage was duly recorded in the several counties, in the States of Ohio, Indiana and Illinois, through or into which the said railroad ran and was situated.

Afterwards and before the beginning of the foreclosure suit hereinafter mentioned, the said The Columbus, Chicago & Indiana Central Railway Company, issued and sold bonds so secured by said mortgage to the amount of ten million four hundred and twenty-eight thousand dollars or more.

On or about the 15th day of December, 1868, the said The Columbus, Chicago & Indiana Central Railway Company made its second mortgage or deed of trust upon all said property to Frederick R. Fowler and Joseph T. Thomas, trustees, for the purpose of securing the payment of five thousand bonds of said company of one thousand dollars each, dated the said 15th day of December, 1868, and due upon the 1st day of February, A. D. 1909, with interest at seven per cent. payable semi-annually. Immediately thereafter the said mortgage was duly recorded in the several counties in the States of Ohio, Indiana and Illinois, through or into which the said "railroad ran or was situated."

It was recited in said mortgage that the said Columbus, Chicago & Indiana Central Railway Company was indebted for out-
23 standing bonds in the sum of eight hundred and twenty-one thousand dollars of the second-mortgage bonds of the Columbus & Indianapolis Central Railway Company being the mortgage described in the petition and the said eight hundred and twenty-one thousand dollars being the eight hundred and twenty-one bonds hereinbefore mentioned. And the said mortgage to Fowler and Thomas, trustees, was made and the bonds thereunder issued and sold to the amount of more than one million two hundred and fifty-eight thousand dollars subject to the said eight hundred and twenty-one thousand dollars of the said issue and no more.

On or about the 22d day of January, A. D. 1869, in consideration

of certain rentals to be paid by the lessee and of other considerations the said Columbus, Chicago & Indiana Central Railway Company by its indentures of lease of that date demised and leased to the Pittsburgh, Cincinnati & St. Louis Railway Company its entire railroad and property used in connection therewith, including the railroad property described in the petition, together with all the rights, privileges and appurtenances thereto belonging with the right to use its franchises and privileges of every character, for the term of ninety-nine years from the 1st day of February, 1869; renewable forever. And on or about the first day of February, 1869, possession of all said railroad and property was delivered to the said Pittsburgh, Cincinnati & St. Louis Railway Company, which company continued to hold possession thereof and to operate the same until after the sale of the said property and railroad as hereinafter set forth.

On or about the 1st day of February, 1875, in the circuit court of the United States, for the southern district of Ohio, and on or about the 2nd day of February, 1875, in the circuit courts of the
24 United States, for the district of Indiana and for the northern district of Illinois, in which several districts the said railroad was situated, the said James A. Roosevelt and William R. Fosdick filed their bills in chancery, being in substance the same, against the said The Columbus, Chicago & Indiana Central Railway Company, Frederick R. Fowler, Archibald Parkhurst and John B. Thompson, wherein they recited the mortgage made by the said railway company to them, and the issue and sale of bonds thereunder, alleging therein the insolvency of the said railway company, its entire failure to make or provide any part of the sinking fund in said mortgage to them mentioned, its failure to pay the interest on underlying mortgages prior to the mortgage to said Roosevelt and Fosdick, setting out therein also the said lease to the Pittsburgh, Cincinnati & St. Louis Railway Company, and alleging that said lease by reason of the rentals therein reserved and secured was valuable for the interest of the complainants and the bondholders whom they represented, and praying in said bills for a decree requiring said railway company to make and set aside the said sinking fund, for the foreclosure of complainant's said mortgage, and for the appointment of a receiver or receivers of all and singular, the said railroad equipment and appurtenances and all the premises embraced in and covered by the said mortgage to them, and of the earnings, income, rents, issues and profits thereof; and asking that in said order the said receivers be directed not to disturb the physical possession of said property by the said lessee, The Pittsburgh, Cincinnati & St. Louis Railway Company, but that said receivers be authorized and directed to receive, sue for and collect all the rental therein reserved and apply the same as the court might direct.

25 In said actions, the defendants were all duly served with process according to law or appeared therein except the said Joseph T. Thomas. The said defendants, Frederick R. Fowler and Joseph T. Thomas, were the trustees to whom the second mortgage

hereinbefore described, had been made by the said Columbus, Chicago & Indiana Central Railway Company. Shortly after the filing of said bills of foreclosure by the said Roosevelt and Fosdick, and before the decree of foreclosure and sale hereinafter described was made therein, the said Joseph T. Thomas resigned his office as trustee under said mortgage, and did not thereafter act as such, and for that reason was not served with process in said actions. Such proceedings were had in said causes, that on or about the 2nd day of February, 1875, the said James A. Roosevelt and William R. Fosdick were duly appointed receivers of said railroad, its equipments and appurtenances and all the premises embraced in and covered by the said mortgage and of the earnings, income, rents, issues and profits thereof, and said receivers were directed, until the further order of the court, they should not disturb the possession of said mortgaged premises by the said Pittsburgh, Cincinnati & St. Louis Railway Company under said lease, but should collect and receive the rental payable by said lessees and should apply the same as should be provided by the further orders of the court.

In said order appointing the said receivers it was further ordered that the defendant, The Columbus, Chicago & Indiana Central Railway Company by its proper officers in that behalf should forthwith transfer and convey to the said receivers the said railroad, its equipments and appurtenances and all the premises embraced in and covered by the said mortgage, and all such income, rents, issues and profits thereof.

26 Immediately thereafter, in pursuance of the said order, the said receivers took possession and control of all said railroad and property, its income, rents, issues and profits to the same extent that the said Columbus, Chicago & Indiana Central Railway Company could have possessed, used, occupied or controlled the same had said foreclosure suit not been begun, and said receivers continued in said possession and control until after the sale of the said railroad and property as hereinafter set forth, whereby the said Columbus, Chicago and Indiana Central Railway Company from the second day of February, 1875, was divested of all its property and resources of every kind, and of the use and enjoyment or control thereof, and of the use of all its said rights and franchises.

Defendant further says, that if the said thirty-six bonds claimed by the plaintiff to be owned by him, or any of them, were ever at any time issued and sold by the maker thereof, The Columbus & Indianapolis Central Railway Company or by either of its said corporate successors, they were issued and sold by the said The Columbus, Chicago & Indiana Central Railway Company in the year 1878, and about the month of May thereof, and during the pendency of said foreclosure suit, and while said corporation was in the hands of the said receivers as hereinbefore set forth.

Therefore, and by reason of the premises, defendant says, that by the issue of said bonds as above alleged, no lien at any time attached to any of the railroad or property described in the petition for the security of said thirty-six bonds or any thereof, but that if

by said issue any such lien did at any time attach to any of said property as between the said Columbus, Chicago & Indiana Central Railway Company and the holder of the said bonds such lien attached as of the date of the issue and sale of the same, and not earlier.

27 Defendant further says, that in said foreclosure suits such proceedings were had that on or about the 15th day of November, 1882, in the circuit court of the United States, for the northern district of Illinois, and on the 16th day of November, 1882, in the circuit court for the district of Indiana, and on the 23d day of November, 1882, in the circuit court for the southern district of Ohio, similar decrees were entered, wherein it was found that the said allegations of the bills of foreclosure were true, and that the said railway company had made default in the payment of interest upon said bonds secured by the said mortgage to Roosevelt and Fosdick, complainants therein, to wit: The installments of interest which fell due on the 1st day of April, 1875, and each and every installment of interest thereafter, and that no part of the same had been paid. And the said court- further found that said railway company had wholly failed to comply with the agreement in said mortgage to create and make the said sinking fund, and that said company had not made or provided any such sinking fund to any extent whatever, but in that behalf had wholly failed and made default. And the said courts further found the said railway company to be insolvent, that the amount then due by reason of the non-payment of said interest was the sum of four million, eight hundred and thirty-four thousand, two hundred and thirty and twenty-three one-hundredths dollars.

In said decree it was ordered and adjudged that in case the said railway company failed for ten days from the date thereof to pay the said sum, the property conveyed by said mortgage including the railroad and property described in the petition should be sold for the payment of the interest and principal of said bonds.

28 In said decrees it was further ordered and adjudged that the said property should be sold free and clear from the lien of the said mortgage to the said Roosevelt and Fosdick and of all liens created subsequent to the date thereof; and it was in said decrees further considered and adjudged that the purchaser or purchasers at said sale should in respect of said mortgaged premises be invested with and hold, possess and enjoy the same and all the rights, privileges and franchises thereto appertaining as fully and completely as the said Columbus, Chicago & Indiana Central Railway Company at the commencement of said foreclosure suits held the same.

And in said decree it was further considered and adjudged that the sale so ordered to be made and the conveyance after confirmation thereof to be executed and delivered in pursuance of said decree should be valid and effectual forever, and that thereby the defendants in the said suits respectively and all persons claiming or to claim under them or any of them subsequent to the beginning of the said foreclosure suits, as purchasers, incumbrance-s or other-

wise howsoever, should be and thereby were forever barred and foreclosed of and from all right, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold and every or any part thereof.

Defendant further says, that thereafter, on the 10th day of January, 1883, the said railway company having failed to pay the said sum as ordered by the said courts, and in pursuance of said decree and in accordance therewith and upon an order of sale theretofore issued for that purpose from said courts, the said property and every part thereof was sold by William P. Fishback, master in chancery of the circuit court for the district of Indiana, and Jacob D. Cox,
special master commissioner theretofore appointed to execute
29 the said order of sale, conjointly with said Fishback by the decree of the circuit court for the southern district of Ohio, unto William L. Scott, Charles J. Osborn and John S. Kennedy, for the sum of thirteen million five hundred thousand dollars, which sum was insufficient to pay the outstanding bonds and the interest then accrued thereon, secured by the said mortgage to the said Roosevelt and Fosdick.

Afterwards, and on or about the 30th day of January, 1883, in the circuit court in the northern district of Illinois, and for the district of Indiana, and on the 31st day of January, 1883, in the circuit court for the southern district of Ohio, the said purchase-money having been paid, there were entered in said causes decrees confirming and approving said sale and ordering the said Fishback, master in chancery, and said Cox as special master commissioner in chancery, to convey to said purchasers in fee-simple all and singular said premises and property rights and franchises in accordance with the former decrees of said courts.

Afterwards, and on or about the 21st day of February, 1883, the said Fishback as master in chancery, and said Cox as special master commissioner, in pursuance of said orders and decrees, did, by their deed of that date, duly convey to the said purchasers, William L. Scott, Charles J. Osborn and John S. Kennedy, in fee-simple all of said premises and property, rights and franchises as fully and completely as they might lawfully do under their said authority and free, clear and discharged of all right, estate and interest, claim, lien and equity of redemption in or to the premises and property, rights and franchises so sold and conveyed, and every or any part thereof of each and every of the defendants to said suits, and of all persons claiming or to claim under them or any of them subsequent to the filing of said bills of foreclosure by said Roosevelt and Fosdick.

30 And this defendant further says, that if a lien at any time attached to any of said property described in the petition for the security of said thirty-six bonds or any thereof, the same was wholly divested and discharged by the proceedings hereinbefore set forth.

Defendant further says, that afterwards on or about the 17th day of March, A. D. 1883, by their deed of that date, the said Scott, Kennedy and Osborn, with their wives respectively, sold and con-

veyed all of said premises and property, rights and franchises for a good and valuable consideration then paid to the Chicago, St. Louis & Pittsburgh Railroad Company, a corporation of the States of Illinois and Indiana, duly authorized to purchase and own the same

On or about the 10th day of June, 1890, the said Chicago, St. Louis & Pittsburgh Railroad Company was duly consolidated according to law with the Pittsburgh, Cincinnati & St. Louis Railway Company, together with other railway companies, under the name of and thereby became The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, this answering defendant. And thereby all and singular the said railroad property and premises, rights and franchises described in the petition become vested in this defendant. Defendant says, that it is now and through its said predecessors in title, has been ever since the conveyance to said Scott, Kennedy and Osborn, in the actual, peaceable and undisputed possession of all said premises, and property, rights and franchises, which include that described in the petition, and this defendant prays that the claim of the plaintiff to have a lien thereon to secure the payment of the said thirty-six bonds and the interest thereon, may be adjudged to be null and void, and that this defendant's title to all said premises and property may be qui-ted against the same.

WATSON, BURR & LIVESAY, *Attorneys.*

31 STATE OF PENNSYLVANIA, } ss:
Allegheny County, }

J. T. Brooks, being duly sworn, says, that he is the second vice-president of the above-named defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and is duly authorized in the premises; that the facts stated and the allegations and denials in the foregoing answer and cross-petition are true as affiant believes.

J. T. BROOKS,
Second Vice-President.

(Duly certified.)

Reply to the Answer and Cross-petition of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

(Filed Oct. 16, 1891.)

Now comes the plaintiff, Charles R. Lynde, and for reply to the answer and cross-petition of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, says, that he denies that at the date named in said answer, Gordon Moody was not the secretary and treasurer of the Columbus, Chicago & Indiana Central Railway Company.

And this plaintiff denies the allegations that the Columbus, Chicago & Indiana Central Railway Company was never served with summons in the action of this plaintiff against the said company.

And this plaintiff denies the allegation of the said answer and

cross-petition that the said bonds, with the said coupons attached, were, without the knowledge or consent of the said The Columbus, Chicago & Indiana Central Railway Company, abstracted from its possession by one B. E. Smith.

32 And this plaintiff denies that said bonds were wholly without consideration.

And this plaintiff denies that the said bonds and coupons thereto attached never became the obligation of the Columbus, Chicago & Indiana Central Railway Company.

And this plaintiff avers that he is and became the *bona fide* holder of said bonds, with the coupons thereto attached, for a good and valuable consideration by him paid therefor, at and before the maturity of the said bonds and coupons, or either of them; and without knowledge or notice of any of the alleged facts in said answer and cross-petition set forth and hereinbefore referred to and denied by this plaintiff.

And this plaintiff, further replying to and answering the said cross-petition of the said defendant, says that he has no knowledge of the alleged mortgage of the Columbus, Chicago & Indiana Central Railway Company, stated in said cross-petition to have been executed on or about the 20th day of February, A. D. 1868, nor of the divers proceedings alleged to have been had thereunder.

And this plaintiff therefore denies each and every allegation in said cross-petition contained, in respect to the said mortgage and said proceedings.

And this plaintiff further says, that he was not, in anywise, a party to the said proceedings and judgments alleged to have been had in the circuit court of the United States for the southern district of Ohio, and in the circuit court of the United States for the southern district of Indiana, and in the circuit court of the United States for the northern district of Illinois; and this plaintiff and his rights are in nowise bound or affected by the said alleged proceedings and judgments.

33 And this plaintiff further replying, denies each and every allegation in said third defense and in said cross-petition contained, not hereinbefore specifically denied.

And this plaintiff annexes hereto and files herewith, his certain interrogatories, which he prays the court may be plainly and fully answered under oath by the secretary and by the treasurer of the said defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

And this plaintiff prays as he has heretofore prayed.

KITTRIDGE & WILBY,
Attorneys for Plaintiff.

(Duly verified.)

Interrogatories to be Answered by the Secretary and Treasurer of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

Int. 1. What is your connection and office with the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, and how long have you held that office?

Int. 2. Has the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company ever paid any interest coupons of the bonds of the Columbus & Indianapolis Central Railway Company executed on or about the 1st day of November, A. D. 1864, and referred to in the defendant's answer in this cause? If so, for what years has the said defendant company paid such coupons, what number of coupons has it paid in each year, and what are the serial numbers of the bonds and coupons in each year which the said defendant company has paid?

34 *Motion.*

(Filed Oct. 31, 1891.)

Now comes The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, defendant herein, and moves the court to strike out from the plaintiff's reply herein filed, the following matter to wit:

"And this plaintiff further replying to and answering the said cross-petition of the said defendant, says that he has no knowledge of the alleged mortgage of the Columbus, Chicago & Indiana Central Railroad Company, stated in said cross-petition to have been executed on or about the 20th day of February, A. D. 1868, nor of the divers proceedings alleged to have been had thereunder. And this plaintiff therefore denies each and every allegation in said cross-petition contained, in respect to the said mortgage and said proceedings" for the reason that said matter as therein set forth is irrelevant.

Second. And defendant moves the court to strike from the said reply, the following matter, to wit:

"And this plaintiff further says, that he was not, in anywise, a party to the said proceedings and judgments alleged to have been had in the circuit court of the United States for the southern district of Ohio, and in the circuit court of the United States for the southern district of Indiana, and in the circuit court of the United States for the northern district of Illinois; and this plaintiff and his rights are in nowise bound or affected by the said alleged proceedings and judgments" for the reason that said matter is irrelevant.

WATSON, BURR & LIVESAY, *Attorneys.*

35 *Demurrer to Interrogatories.*

(Filed Oct. 31, 1891.)

Now comes the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and demurs to the interrogatories attached to and filed with the plaintiff's reply herein for the reason that the same and each thereof are irrelevant.

WATSON, BURR & LIVESAY, *Attorneys.*

Amendment to Answer.

(Filed Jan. 12, 1892.)

Now comes the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, leave of the court having first been obtained, and for amendment to its answer herein to be inserted upon the 10th page at the end of line 26 thereof, says:

In pursuance of and in obedience to the order of court hereinabove set forth, the defendant, The Columbus, Chicago & Indiana Central Railway Company, on or about the 25th day of May, 1875, duly executed and delivered its deed to the said William R. Fosdick and James A. Roosevelt, and thereby conveyed to them as such receivers all the railroad, equipment and appurtenances and other premises embraced in and covered by the mortgage to them as trustees, dated the 20th day of February, 1868, hereinbefore mentioned.

WATSON, BURR & LIVESAY, *Attorneys.*

36 *Transcript of Journal Entries.*

(Filed July 29, 1892.)

In the Court of Common Pleas.

I, Wm. H. Simonton, clerk of the court of common pleas, within and for the county of Franklin, do hereby certify that the following entries and judgments are truly copied from the journals of said court, to wit:

April Term, July 14, 1891.

Upon application of the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co., leave is granted said company to plead herein by Oct. 1st, 1891.

September Term, October 15, 1892.

Now comes the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and by leave of the court first had and obtained, files its answer and cross-petition herein.

September Term, December 7, 1891.

This day this cause came on to be heard upon the motion of the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, to strike out certain matters from the reply, and was argued by counsel, and the court being fully advised in the premises, do find that said motion ought not to be granted and the same is overruled and thereupon said cause was further submitted to the court upon the demurrer of the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, to the interrogatories annexed to the reply, and the court after argument find the said demurrer not well
37 taken and the same is hereby overruled, to which ruling the said defendant excepts. It is further ordered that the said interrogatories be answered on or before the 26th day of December, 1891.

January Term, January 12, 1892.

On motion of the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co., leave is given to file an amendment to its answer herein and the same is accordingly filed and by agreement it is ordered that the allegations of said amendment shall be considered as denied by the denials of plaintiff's reply hereinbefore filed.

April Term, July 9, 1893.

This cause coming on for hearing on the pleadings, evidence and exhibits, was argued by counsel and submitted to the court. And the court, upon consideration, finds that each and every of the said parties defendant have been served with process herein, or otherwise duly notified, according to law, of the pendency and prayer of the petition of the plaintiff herein, or have filed their answers herein.

And the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, with a view of excepting to the decision of the court upon the questions of law involved in the trial, requested the court to state in writing the conclusions of fact found separately from the conclusions of law.

And the court, being fully advised in the premises, finds the following conclusions of fact:

I. On the 1st day of November, A. D., 1864, the Columbus & Indianapolis Central Railway Company was a corporation duly organized under the laws of the States of Ohio and Indiana, having its principal office and place of business in said State of Ohio,
38 and on said day the said railway company prepared, signed and sealed its certain series of bonds, of that date, numbered consecutively from one to one thousand inclusive, for one thousand dollars each, including the thirty-six (36) bonds described in the petition herein, payable to William D. Thompson or bearer on the 1st day of November, in the year 1904, and bearing interest at the rate of seven per cent. per annum, payable semi-annually on the 1st days of May and November of each year; each of said bonds having thereto annexed coupons payable to bearer, semi-annually

in the city of New York, on the 1st day of May and November of each year for the semi-annual installments of said interest. The said bonds and coupons were in the words and figures as set forth in the petition.

II. At the time of the signing and sealing of said bonds, the said Columbus & Indianapolis Central Railway Company owned and was operating a railroad extending from the city of Columbus, Franklin county, Ohio, to the city of Indianapolis, in Marion county, Indiana (including a branch from Covington to Union in said State of Ohio), with its franchises, equipment and property as described in the petition, subject to a first mortgage theretofore made by said company.

III. At the time of the signing and sealing of the bonds hereinbefore described, the said Columbus & Indianapolis Central Railway Company executed and delivered its certain mortgage or deed of trust of that date to the defendant, Archibald Parkhurst, as trustee, in the words and figures following, viz:

This indenture, made on the 1st day of November, in the year one thousand eight hundred and sixty-four, between the Columbus & Indianapolis Central Railway Company, a corporation of
39 the States of Ohio and Indiana, of the first part, and Archibald Parkhurst, of the city of New York, trustee, upon certain trusts hereinafter provided, party of the second part, witnesseth:

Whereas, the Columbus & Indianapolis Railroad Company, a corporation of the State of Ohio, lately of that name, whose road extended from Columbus to Covington and thence to Union, purchased the railroad of the Richmond & Covington Railroad Company, a railroad extending from said Covington to the State line between the States of Ohio and Indiana, and which said last-mentioned road with its appurtenances and appendages, for the consideration in the agreement of sale mentioned, was duly conveyed to said Columbus & Indianapolis Railroad Company, whereby the railroad of the last-named company formed a continuous line of railroad without break and of the same gauge from Columbus to said State line and there connected by continuous line of the same gauge with the railroad of the Indiana Central Railway Company from said State line to the city of Indianapolis in the State of Indiana.

And whereas afterward, the said Columbus & Indianapolis Railroad Company and the Indiana Central Railway Company in the lawful exercise of their corporate powers under their charters, and the laws of the States of Ohio and Indiana consolidated themselves together and became one single corporation under the name of the Columbus & Indianapolis Central Railway Company, the party hereto of the first part, whereby the said party of the first part became liable for and assumed all the just debts and liabilities existing against either of said companies thus consolidated and composing the first party.

And whereas, the Columbus & Indianapolis Railroad Com-
40 pany heretofore became indebted by the issue of bonds secured by a second mortgage on their said railroad and its appurtenances, etc., amounting to four hundred thousand dollars, and

also became indebted by the issue of other bonds secured by their mortgage on their said railroad amounting to four hundred thousand dollars.

And whereas, the party of the first part deem it expedient to create a fund of two hundred thousand dollars (in addition to three hundred and four thousand dollars heretofore provided) to pay for an additional equipment and machinery that may be required by the party of the first part all of which said mortgage bonds and additional fund for equipment and machinery amounts in the aggregate to one million of dollars.

And whereas, at a meeting of the board of directors of the Columbus & Indianapolis Central Railroad Company held at Columbus on the thirteenth day of October, A. D. 1864, the said board determined that it was expedient for said corporation to reduce to a single form and class as well as the said bonded indebtedness of the Columbus & Indianapolis Central Railway Company growing out of said second and third mortgage bonds of the Columbus & Indianapolis Railroad Company amounting to eight hundred thousand dollars and also the said fund of two hundred thousand dollars for additional equipment and machinery, making in the aggregate one million of dollars, and it was thereupon resolved by said board:

First. That a new series of one thousand bonds of this company be prepared for issue and delivery signed by the president and secretary and authenticated when issued by the certificate of a trustee each for the sum of one thousand dollars, to be numbered consecutively from one to one thousand, bearing date the first
41 day of November, A. D. 1864, and payable to W. D. Thompson, or bearer, in the city of New York, on the first day of November, A. D. 1904, with interest warrants thereto attached, signed by the secretary, for the payment of interest thereon at the rate of seven per centum per annum, payable at the same place, half yearly on the successive first days of May and November of each year.

Second. That a deed of conveyance be prepared and executed, to be signed by the president and secretary, conveying the road and its appurtenances and appendages, its franchises, equipments, property, tolls, income and interest, to a trustee, to secure the payment of said bonds and interest warrants and in such form and with such provisions as the president of this company by executing the same shall approve subject to a prior lien of three millions two hundred thousand dollars.

Third. That unless the board of directors otherwise direct, the said bonds shall be used for no purpose except to be negotiated, substituted or exchanged for the present outstanding bonds hereinabove mentioned of eight hundred thousand dollars and for said additional equipment and machinery to the amount of two hundred thousand dollars and so that by the surrender and payment of said outstanding bonds, the whole second and third mortgage bonded indebtedness of this company may be included and expressed in and by the bonds prepared under this resolution.

Fourth. That a sinking fund of five thousand dollars annually to provide for the payment of said bonds shall be formed by setting apart on the first day of November, A. D. 1865, and each and every year thereafter on the first day of November the sum of five thousand dollars. This sinking fund shall be kept and invested by three commissioners, one of whom shall be president of this
42 company, the other two shall be members of this board, one of which shall be changed annually. They shall invest the said fund in the outstanding second mortgage bonds of this company if the same can be obtained at a price not exceeding ten per cent. premium, otherwise at the discretion of the commissioners in stocks of the United States or the States of Ohio and Indiana.

Fifth. The commissioners shall frame rules for the safety and management of the said trust and file the same with the treasurer; and shall annually file their report with the treasurer, showing the condition, amount and investment of said sinking fund.

And, whereas, the said Columbus & Indianapolis Central Railway Company hath made and executed one thousand bonds of the numbers, form, denomination and character prescribed by said resolution and holds the same to be authenticated, used and disposed of in accordance with the provisions and requisitions of said resolution.

Now, therefore, in further pursuance of said resolution and to the end and purpose of assuring the punctual payment of the said one thousand bonds and each of them to each and every person who may become the holder of the same or any of them.

This indenture witnesseth, that the said Columbus & Indianapolis Central Railway Company, party of the first part, in consideration of all and singular the premises, and for the further consideration of one dollar paid to said company by Archibald Parkhurst of the second part, at and before the ensealing of these presents, the payment of which is hereby acknowledged, doth hereby grant, bargain, sell, enfeoff, release, assign and convey unto the said Parkhurst, his heirs, executors, and administrators, all and singular, the
43 entire railroad of the first party, extending from Columbus to Indianapolis, including the branch from Covington to Union, and its franchises, equipments, property, tolls and interest; that is to say, the lands, tenements, hereditaments, fixtures, goods and chattels of said company, its property rights, privileges, interest and estate of every description and nature, its rails, ties, fences, buildings and erections, its rights of way, cars, engines, tools and machinery, its rents, reservations and reversions of every nature, including all the property which said first party now possesses or may hereafter acquire, with the benefit of all contracts which said first party hath made or by assignment or succession hold or may hereafter make or have, either in law or equity, and the right to all tolls, incomes, issues, profits and interests which may hereafter accrue to said first party from any source whatever; provided, however, that the grant and conveyance aforesaid shall not include nor operate to transfer nor be held to prohibit the first party from selling and conveying any land which said company own that is not

and cannot be used for any purpose incident to the management and business of said railroad company or the repairs of the road, nor be held to prohibit said first party from applying any money or personal property belonging to said company, to the repairs of said road or its appurtenances, or to its current expenses, or to the purchase of the necessary machinery or the rental thereof; and the board of directors may likewise lawfully distribute such net annual income or profits to stockholders after paying the interest of said bonds and providing for said sinking fund as shall accrue beyond said interest and sinking fund.

And provided further, that this conveyance is made subject to the prior rights, property, estate and liens created by a certain mortgage or trust deed hereinafter mentioned.

44 To have and to hold the premises, interest and rights which pass or are intended to pass by this conveyance unto the said Parkhurst, his heirs, assigns, executors and administrators forever.

In trust nevertheless for the persons and corporations and for the benefit, protection and security of the persons or corporations who shall hold the bonds about to be issued by the party of the first part and for enforcing the stipulations of said company in this behalf in their true intent and meaning, whether contained in said bonds or interest warrants, or in this deed and for the better assuring and confirming the title and power of the said Parkhurst, his heirs and assigns, executors and administrators and especially in relation to such property, interest and rights hereafter ac-ruing to or acquired by said company and intended to pass by this conveyance. The said party of the first part hereby covenants with the said party of the second part, his heirs, assigns, executors and administrators, that at any time hereafter and as often as may be required by the person or persons holding the above-granted estate in trust, the said company will do such acts and make such further assurances in law as such trustee or trustees shall by counsel learned in the law be reasonably advised are necessary for or tend to the better carrying out of the object of the parties to this mortgage or deed of trust. In case default be made by said company in payment of any money either principal or interest secured by this mortgage, the said party of the first part here covenants and agrees with the said grantee, that within six months after such default shall have been made (the same default still continuing) the said company on the demand of the trustee or trustees for the time being shall surrender to him or them or to their agent the actual possession of the herein

45 granted and demised premises together with the record books, papers and accounts of said company; the expense of taking and holding and managing said property if possession be taken to be paid from the income, and if necessary, from the sale of such personal property as the trustee or trustees may deem proper, and the said party of the first part doth herewith and hereby give its warrants of attorney irrevocably by which in case of default by said company to make payment of any sum of money, either principal or interest secured by this mortgage for the period

of six months after the same shall have become due and payable, the said company doth authorize any lawful attorney-at-law or solicitor in chancery of the States of Ohio or Indiana, to enter the appearance of said company without process in any court or courts of competent jurisdiction, to any bill or bills filed by the trustee or trustees for the time being for the foreclosure and sale of the premises by this deed granted and conveyed or a part thereof; and if requested by said trustee or trustees to consent on behalf of said company, that a receiver or receivers be appointed forthwith by order of said court or courts, to take possession of said road or any part thereof, and of all or any of the property, real or personal hereby conveyed, and of all or any of the effects, books, business or papers of said company upon such terms, etc., as said court or courts shall prescribe, and further to consent that a decree or decrees forthwith pass for the sale of the whole or any part of the premises hereby granted and conveyed, without appraisement, but under the direction of the court, and to enter on behalf of said company a stipulation not to appeal from said decree and not to impede the execution thereof by an application for a rehearing or by bill of revivor or by other step to produce delay.

46 Provided however, that said trustees shall not demand the surrender of possession of said property, or file a bill for the foreclosure and sale of said premises unless the same is requested in writing by holders of at least three hundred of said bonds. And it is further agreed by the party of the first part that in case the said company for the term of six months shall make default of the payment of its interest warrants or any of them, then the whole principal money contained in the said bonds shall become due and payable. And it is further agreed by the party of the first part that the proceeds of the sale hereinbefore mentioned, shall be applied, first, to paying said trustee all reasonable charges and expenses and to indemnifying him from all liability as trustee. Secondly, to paying the holders of said bonds in full or in equal proportions the principal and interest of said bonds, and lastly, to pay the surplus, if any, to the members of said company, who hold stock at the time of the sale.

It is hereby mutually agreed by the parties that the said trustee shall be responsible for gross negligence and willful default only nor shall said trustee be bound to take any steps unless at his option touching the execution of this trust, which in his opinion is likely to involve him in expense or personal liability, unless some one or more of the bondholders as often as the trustee shall deem necessary, shall give to said trustee reasonable security to indemnify him against such expense and personal responsibility anything hereinbefore contained to the contrary notwithstanding. In all cases in which the trustee may be required to act he is hereby invested with full power of arbitrament and of compromise and of appointing agents and attorneys to act in his behalf.

Upon the decease or inability to act of the said Archibald
47 Parkhurst, or of any other trustee hereafter appointed by a court of equity as successor, any court of competent jurisdic-

tion is hereby authorized to appoint a trustee in the place of such deceased trustee on application by the holders of one-sixth of the number of said bonds and by decree or otherwise invest the person so appointed with the full estate, powers, rights, interests and obligations of the present trustee and subject to the provisions and stipulations of this indenture. And it is hereby declared that all the estate, trusts, powers, provisions, stipulations and conditions, of this indenture shall attach to and be executed by whomsoever shall be appointed trustee as aforesaid in the same manner as by and to the said original trustee.

Provided, however, nevertheless and these presents are upon the following express conditions, that if the said party of the first part shall well and truly pay to the holders of the said bonds the several and respective sums of money and interest due and accruing on the day and according to the conditions therein expressed, then and thenceforth this indenture and the estate hereby granted shall become void.

It is hereby made known and declared that this conveyance and the trusts and provisions therein contained are subordinate, and subject to a prior lien created by a certain mortgage or trust deed heretofore executed by the first to the second party and dated on the 13th day of October, A. D. 1864, to secure the payment of thirty-two hundred bonds of one thousand dollars each, with interest from January 1st, 1865, at the rate of seven per cent. per annum, payable semi-annually, and which bonds are due on the 1st day of November, in the year one thousand nine hundred and four, and further secured by the reservation annually of a sinking fund of sixteen thousand dollars.

48 In witness whereof, the said party of the first part to these presents in duplicate hath set its corporate seal, and the president and secretary duly authorized by resolution of said company hath for and in behalf of said company subscribed the same.

COLUMBUS & INDIANAPOLIS CENTRAL RAILWAY,

[CORPORATE SEAL.] By B. E. SMITH, *President.*

Attest: G. MOODIE, *Secretary.*

Signed, sealed and acknowledged in presence of us—

WM. FERSON.

WM. JAMISON.

STATE OF OHIO, }
Franklin County, } ss:

Be it remembered, that on the fourth day of November, A. D. 1864, at said county of Franklin, before me, the undersigned, a notary public in and for said county and State, personally appeared on behalf of the Columbus and Indianapolis Central Railway Company, the within-named Benjamin E. Smith, the president, and Gordon Moodie, secretary of said company, and the signers of the

within deed, and acknowledged the ensealing of said deed with the corporate seal of said company, and the execution thereof by them in behalf of said company, to be the voluntary act and deed of said company and their voluntary act and deed as such president and secretary.

In witness whereof I have hereunto affixed my notarial seal and official signature the day and year first above written.

[SEAL.] WM. JAMISON,
Notary as Aforesaid.

Entered for record November 11 at 8 a. m., and recorded November 12, 1864. Recorder's fee, $5; postage, 20 cents.

H. M. LUKENS, *R. M. C.*

$5.20 paid by F. Chance.

Said Parkhurst having duly accepted said trust, the said mortgage or deed of trust was during the month succeeding the execution of the same duly recorded in the office of the county recorder of each of the counties in the States of Ohio and Indiana through or into which the said railroad was constructed.

V. Shortly after the signing and sealing of said one thousand bonds they were all duly certified by the said Archibald Parkhurst, trustee, in the form as appears in the copy of said bond set forth in the petition.

VI. Prior to January 1, 1867, seven hundred and ninety of said one thousand bonds had been duly issued in exchange for a like number and amount of the said second and third mortgage bonds of the said Columbus & Indianapolis Railroad Company as provided in said mortgage, and thirty-one of said bonds had been duly issued and sold by said railway company. The highest serial number of the eight hundred and twenty-one bonds so issued and exchanged or sold was No. 833. The remaining one hundred and seventy-nine of said one thousand bonds, including all the thirty-six bonds described in the petition, having been delivered prior to 1870 by A. Parkhurst, the trustee to Benj. E. Smith, as president of the company, remained in his possession as president of said company and the companies into which the same was successively consolidated as hereinafter set forth, unissued until the months of November and December, A. D. 1875, and the happening of the events in those months hereinafter set forth. To which finding the plaintiff excepted.

VII. On or about the 11th day of September, 1867, the Columbus & Indianapolis Central Railway Company was consolidated with the Union & Logansport Railroad Company and the Toledo, Logansport & Burlington Railroad Company under the laws of the States of Ohio and Indiana, and became the Columbus & Indiana Central Railway Company.

VIII. On or about the 12th day of February, A. D. 1868, the said Columbus & Indiana Central Railway Company and the Chicago & Great Eastern Railroad Company were consolidated under the laws of Ohio, Indiana and Illinois into and under the

name of The Columbus, Chicago & Indiana Central Railway Company, one of the defendants in this action.

IX. On or about the 20th day of February, A. D. 1868, the said Columbus, Chicago & Indiana Central Railway Company made and executed its fifteen thousand bonds of that date, each for the sum of one thousand dollars, bearing interest at the rate of seven per cent. per annum, payable semi-annually and due upon the first day of April, A. D. 1908, and in order to secure the payment of said bonds, executed and delivered its mortgage or deed of trust of that date to James A. Roosevelt and William R. Fosdick, trustees, and thereby conveyed to them all its property, including all that which had formerly belonged to the Columbus & Indianapolis Central Railway Company, described in the petition.

X. Immediately thereafter the said mortgage was duly recorded in the office of the county recorder of the several counties in the States of Ohio, Indiana and Illinois, into or through which the said railroad ran or was situated.

XI. Afterwards and before the beginning of the foreclosure suit hereinafter mentioned the said Columbus, Chicago & Indiana Central Railway Company issued and sold of said fifteen thousand bonds so secured, bonds to the amount of ten million four hundred and twenty-eight thousand dollars or more.

51 XII. On or about the 15th day of December, A. D. 1868, the said Columbus, Chicago & Indiana Central Railway Company made and executed its five thousand bonds each for the sum of one thousand dollars, of that date and due upon the 1st day of February, A. D. 1909, with interest at seven per cent. per annum, payable semi-annually and for the purpose of securing the payment of said bonds and interest, executed and delivered its second mortgage or deed of trust to Frederick R. Fowler and Joseph T. Thomas, trustees, and thereby conveyed to them all its said property including the property described in the petition. Immediately thereafter the said mortgage was duly recorded in the office of the county recorder in the several counties in the States of Ohio, Indiana and Illinois, through or into which the said railroad ran and was situated.

XIII. It was set forth in said mortgage or deed of trust that the said mortgagor, in addition to fifteen million dollars of first-mortgage bonds was then indebted for outstanding bonds as follows, to wit:

Second-mortgage bonds of the Columbus & Indianapolis Central Railway Company.....	$821,000 00
Income bonds of the Columbus & Indiana Central Railway Company....	1,243,000 00
Chicago & Great Eastern Railway Company construction and equipment bonds....	400,000 00
Total.....	$2,464,000 00

and was further indebted in other liabilities in the estimated sum of two million and five hundred thousand dollars, and it was pro-

vided in said mortgage that of said issue of five million dollars of bonds, the sum of two million five hundred thousand dollars,
52 being bonds numbered 2501 to 5000 inclusive, should be set aside and appropriated and used only in exchange for and to satisfy the two million four hundred and sixty-four thousand dollars of bonds hereinbefore mentioned and recited.

XIV. The eight hundred and twenty-one second-mortgage bonds of the Columbus & Indianapolis Central Railway Company set forth in said mortgage as above set forth were the eight hundred and twenty-one bonds secured by the said mortgage to Archibald Parkhurst, trustee, issued and sold or exchanged by the said Columbus & Indianapolis Central Railway Company hereinbefore described.

XV. On or about the 22nd day of January, A. D. 1869, the said Columbus, Chicago & Indiana Central Railway Company, in consideration of certain rentals to be paid by the lessee by its indenture of lease of that date demised and leased to the Pittsburgh, Cincinnati & St. Louis Railway Company, its entire railroad and property including the railroad and property described in the petition, for the term of ninety-nine years from the 1st day of February, A. D. 1869, renewable forever. And on or about the 1st day of February, A. D. 1869, possession of all said railroad and property was delivered by said lessor to the said Pittsburgh, Cincinnati & St. Louis Railway Company, which company continued to hold possession thereof and to operate the same as such lessee till after the sale of said railroad and property hereinafter set forth.

XVI. It was provided in said lease, that out of the gross annual earnings of said railroad and property, the lessee should first pay all taxes and assessments that should be imposed upon the said property; and that of the surplus of said gross earnings, the said lessee should be entitled to receive seventy per centum for
53 its own use, that the remainder of said gross earnings should be applied—first, to the payment of the interest that should accrue after February 1, 1869, upon the $20,000,000 of bonds of the said lessor, being the bonds secured by the two mortgages to Roosevelt and Fosdick and to Fowler and Thomas, hereinbefore described. Second, to the payment of the interest upon certain income bonds thereafter to be issued by said lessor and which were provided for in the said lease. Third, the balance, if any remaining, to be paid to the said lessor to be distributed as dividends upon its stock or otherwise as said lessor should determine.

XVII. It was further provided in said lease that the lessee should provide the means for and should acquire any needful right of way and real estate, erect such necessary depot, buildings, shops, engine-houses, side tracks and appurtenances and for other permanent construction as might be required to accommodate the traffic upon said railroad and should be entitled to receive for advances so made, income bonds of the said lessor company at par bearing seven per cent. interest payable at such times as should be agreed upon, such bonds to be convertible into stock at the option of the holder at any time. The aggregate of such expenditure not to exceed in the three years following the taking effect of said lease, the sum of

$2,000,000. Expenditures of like character thereafter and the means required therefor were to be matters of mutual agreement from time to time.

XVIII. It was further provided in said lease that no issue of bonds beyond the fifteen millions of first-mortgage consolidated bonds, being the bonds secured by said mortgage to Roosevelt and Fosdick and the five millions of second-mortgage consolidated bonds, being the bonds secured by said mortgage to Fowler
54 and Thomas, and the said two millions of income bonds should be issued by the said lessor company without the consent of the board of directors of the respective parties to the said lease.

XIX. Thereafter no authority or consent was ever given by the board of directors of the said Columbus, Chicago & Indiana Central Railway Company to the issue or sale of the said one hundred and seventy-nine bonds or any of them. To which finding plaintiff excepted.

XX. On or about the 29th day of May, A. D., 1873, the said lease was duly recorded in the Record of Leases in the office of the county recorder of the said county of Franklin and the other counties in the States of Ohio, Indiana and Illinois, into or through which the said railroad ran and was situated.

XXI. On the first and second days of February, A. D. 1875, the said James A. Roosevelt and William R. Fosdick, trustees under the mortgage to them hereinbefore described, commenced their actions for the foreclosure of said mortgage and for other purposes, but not affecting the Parkhurst mortgage aforesaid or the bonds thereby secured concurrently in the circuit courts of the United States for the southern district of Ohio, the district of Indiana and the northern district of Illinois.

XXII. In said actions, one William L. Scott appeared and filed his cross-bill in October, 1881, claiming to be the owner of certain bonds secured by the said mortgage to said Roosevelt and Fosdick, and praying among other things for the foreclosure of the same mortgage, but asking no relief against said Parkhurst mortgage or the bonds secured thereby. Prior to the beginning of said foreclosure suit the said Joseph T. Thomas resigned his said trust under the said mortgage to Frederick R. Fowler and the said Joseph T.
55 Thomas and thereafter the said trust was administered by the said Frederick R. Fowler alone. In said actions the said Columbus, Chicago & Indiana Central Railway Company, Frederick R. Fowler, and others were made parties defendant, and were duly served with process or entered their appearance therein.

XXIII. In said bills of foreclosure the said complainants among other things prayed for the appointment of a receiver or receivers of all said railroad, equipment and appurtenances and other mortgaged premises and of the earnings and income, rents, issues and profits thereof and that the net amount of said earnings should be first applied to the payment of the interest on all the bonds issued under the said mortgage to the complainants and to the payment of the interest on all mortgage bonds having prior liens on said

property in such order as the court might direct and that the balance should be applied to the payment of the sums due and in arrears to and for the sinking fund provided for in said mortgage to them for the redemption of the bonds issued under said mortgage. Such proceedings were had in the said actions in pursuance of the prayer of the said complainants that on the 2d and 3d days of February, 1875, in said courts, the said James A. Roosevelt and William R. Fosdick were duly appointed receivers of the said railroad, equipment and appurtenances and other mortgaged premises embraced in and covered by said mortgage and of the earnings, income, rents, issues and profits thereof and said receivers were directed not to disturb the possession of said mortgaged premises by the said Pittsburgh, Cincinnati & St. Louis Railway Company under the lease to it, but should collect and receive the rental payable by said lessee and should apply the same as provided by the further orders
56 of the court. And it was in said order of appointment further ordered that the Columbus, Chicago & Indiana Central Railway Company by its proper officers in that behalf forthwith transfer and convey to said receivers, the said railroad equipment and appurtenances and other mortgaged premises embraced in and covered by said mortgage and such income, rents, issues and profits thereof.

XXIV. In pursuance of and in obedience to the said orders of court, on or about the 25th day of May, the said Columbus, Chicago & Indiana Central Railway Company duly executed and delivered to the said James A. Roosevelt and William R. Fosdick its deed and thereby conveyed to them as such receivers the said railroad equipment and appurtenances and other mortgaged premises embraced in and covered by said mortgage to them, and the income, rents, issues and profits thereof.

XXV. The said deed was not recorded and the plaintiff, Charles R. Lynde, had no actual knowledge of the existence thereof until the commencement of this action in the year 1891.

XXVI. Immediately after their said appointment the said receivers in pursuance of said order took possession and control of all said railroad and property, its income, rents, issues and profits subject to the physical possession and operation of the said railroad by said lessee, and said receivers continued in the possession and control of the same until after the sale of the said railroad and property hereinafter set forth.

XXVII. Such further proceedings were had in said foreclosure suits that on the 15th, 16th and 23d days of November, 1882, in the said circuit courts similar decrees were entered wherein it
57 was found that said Columbus, Chicago & Indiana Central Railway Company had made default in the payment of the interest on the bonds secured by said mortgage to the said Roosevelt and Fosdick, that said railway company had failed to comply with the agreements in said mortgage in respect to said sinking fund and that said railway company was insolvent and it was therein ordered and adjudged that in case the said railway company failed for ten days to pay the sum found due in said decree, the said

mortgage to the said Roosevelt and Fosdick should be foreclosed and the property conveyed by said mortgage, including all the property described in the petition herein, should be sold for the payment of the principal and interest of said bonds.

XXVIII. In said decree it was further ordered and adjudged, that the said property should be sold subject to the outstanding sectional bonds prior in lien to the mortgage to said Roosevelt and Fosdick, and to all other if any paramount liens thereon, but free from the lien of said mortgage to the said Roosevelt and Fosdick, and that nothing in said decree contained should in any manner effect, prejudice or preclude the holders of said paramount liens or any of them, but that said decree should be without prejudice to the right of them and each of them, and in said decree it was further ordered and adjudged, that the purchaser of said mortgaged premises should, in respect of said premises be invested with, and should hold, possess and enjoy the same and all the rights, privileges and franchises appertaining as fully and completely as the said Columbus, Chicago & Indiana Central Railway Company at the commencement of said suit by said Roosevelt and Fosdick held or now holds and enjoys, or is entitled to hold or enjoy the same, but free from the liens then represented by any party to said cause.

58 XXIX. In said decree it was further ordered and adjudged, that the sale therein decreed to be made and the conveyance, after confirmation thereof, to be executed and delivered in pursuance of said decree, should be valid and effectual forever, and that thereby the defendants in said suits, respectively, and all persons claiming or to claim under them or any of them, subsequent to the beginning of said suits, by the said Roosevelt and Fosdick as purchasers, incumbrancers or otherwise, howsoever, should be, and that they thereby were forever barred and foreclosed of and from all right, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold and every or any part thereof.

XXX. On or about the 10th day of January, 1883, the said Columbus, Chicago & Indiana Central Railway Company having failed to pay the said sum as ordered by the said courts, and in pursuance of said decree and in accordance therewith, and upon an order of sale theretofore, issued for that purpose from said courts, the said property and every part thereof was sold by William P. Fishback, master in chancery of the circuit court for the district of Indiana and Jacob D. Cox, special master commissioner theretofore appointed to execute the said order of sale conjointly with said Fishback by the decree of the circuit court for the southern district of Ohio, unto William L. Scott, Charles J. Osborn and John S. Kennedy for the sum of thirteen million five hundred thousand dollars, which sum was insufficient to pay the outstanding bonds and the interest then accrued thereon, secured by the said mortgage to the said Roosevelt and Fosdick.

XXXI. Afterwards, and on or about the 30th day of Janu-
59 ary, 1883, the circuit courts for the northern district of Illinois, and the district of Indiana, and on the 31st day of

January, 1883, the circuit court for the southern district of Ohio, the said purchase-money having been paid, by orders entered in said causes, duly confirmed and approved said sale and ordered the said Fishback, master in chancery, and said Cox, as special master commissioner in chancery to convey to the said purchasers in fee-simple, all and singular said premises and property, rights and franchises in accordance with the former decrees of said courts.

XXXII. Afterwards, and on or about the 21st day of February, 1883, the said Fishback, as master in chancery, and said Cox, as special master commissioner, in pursuance of said orders and decrees, executed and delivered their deed of that date, and thereby conveyed to the said purchasers, William L. Scott, Charles J. Osborn and John S. Kennedy, in fee-simple, all of said premises and property, rights and franchises, as fully and completely as they might lawfully do under their said authority, and free, clear and discharged of all rights, estate and interest, claim, lien and equity of redemption in or to the premises and property rights and franchises so sold and conveyed, and every or any part thereof of each and every of the defendants to said suits, and of all persons claiming or to claim under them or any of them subsequent to the filing of said bills of foreclosure by said Roosevelt and Fosdick.

XXXIII. Afterwards, on or about the 17th day of March, A. D., 1883, the said Scott, Kennedy and Osborn, with their wives respectively, executed and delivered their deed of that date and thereby conveyed all of said premises and property, rights and franchises for a good and valuable consideration then paid, to the Chicago, St. Louis & Pittsburgh Railroad Company, a corporation of the States of Illinois and Indiana, duly authorized to purchase and own the same.

XXXIV. On or about the 10th day of June, 1890, the said Chicago, St. Louis & Pittsburgh Railroad Company was duly consolidated with the Pittsburgh, Cincinnati & St. Louis Railway Company, together with other railway companies under the name of and thereby became The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, defendant in this action.

XXXV. The defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, is now and through its said predecessors in title has been ever since the said conveyance to Scott, Kennedy and Osborn in the actual, peaceable and undisputed possession of all said railroad, premises and property, rights and franchises, including that described in the petition.

XXXVI. On and before the first day of November, A. D., 1864, one Benjamin E. Smith was the president of the said Columbus & Indianapolis Central Railway Company and continued to be the president of said railway company and its successors into which it was successively consolidated until the sale of the said railroad hereinbefore mentioned in 1883.

XXXVII. In the months of November and December, A. D., 1875, the said Benjamin E. Smith borrowed for his own purposes certain sums of money amounting to $48,000 from W. H. Newbold,

Son & Co., a firm of brokers in the city of Philadelphia, for which he executed and delivered to them his individual notes, and at the same time having as president of the said Columbus, Chicago & Indiana Central Railway Company, the custody and possession of the one hundred and seventy-nine bonds hereinbefore de-
61 scribed, he then, without the knowledge, authority or consent of the said Columbus, Chicago & Indiana Central Railway Company, but falsely pretending to the said W. H. Newbold, Son and Co. that he was individually the owner of said bonds, delivered certain of said bonds, including the thirty-six bonds described in the plaintiff's petition, to the said W. H. Newbold, Son & Co. as collateral security for the payment of his said notes. To which finding the plaintiff excepted.

XXXVIII. Thereafter the said Smith renewed his said notes with the same collateral from time to time until about the 14th day of January, 1878, when the bonds so held as collateral security were sold by the said W. H. Newbold, Son & Co. and the proceeds applied to the payment of said notes and the balance paid over to the said Smith or for his use, and no part of the same was used for the benefit of said railway company. To which finding plaintiff excepted.

XXXIX. At the time the said bonds were so pledged to the said W. H. Newbold, Son & Co., all the past-due coupons had been cut off and while they were so held as collateral security the subsequent coupons as they came due were cut off from the said bonds and delivered to the said Smith, but the same were never presented for payment. To which finding plaintiff excepted.

XL. At the sale of said bonds the said W. H. Newbold, Son & Co. themselves became the purchasers of all said thirty-six (36) bonds, paying the full market price at the time of the purchase, and buying them in good faith without knowledge of any defect in them or any of them; and thereafter they sent the said thirty-six bonds to New York for sale. Plaintiff in the months of May, July and Au-
gust, 1878, purchased said thirty-six bonds in good faith in
62 the usual course of business for valuable consideration, being about ninety cents on the dollar, which was at the time the usual market price for the bonds secured by said second mortgage, and without knowledge or notice of any of the unauthorized or fraudulent acts of said Smith concerning said bonds, and without any knowledge or notice that said bonds had not been sold by the said Columbus & Indianapolis Railway Company and thereby became and is now the *bona fide* holder and owner of said thirty-six bonds and the coupons thereto belonging, described in the petition; and that before said thirty-six bonds had been purchased by plaintiff, the railway company had not made default in the payment of interest on said thirty-six bonds, and no holder of said bonds prior to said plaintiff had elected that the principal sum thereof should become due.

XLI. At the time when plaintiff purchased the said thirty-six bonds, the coupons belonging thereto due May 1, 1878, were still attached to the said bonds and were unpaid.

XLII. On or about the 27th day of August, 1878, the plaintiff

presented the said thirty-six bonds for registration to the secretary of the Union Trust Company, New York, which company had been there-fore designated by said Columbus, Chicago & Indiana Central Railway Company, as its registering agent for said bonds in the city of New York, to put the bonds in the name of the party registering them and taking them out of the register and making them to bearer; and the secretary then caused the same to be registered in the name of said Charles R. Lynde. At the time of said registration no inquiry was made by the said secretary as to whether or not the said bonds had been regularly issued by the said Columbus & Indianapolis Central Railway Company. To the last five lines of which finding plaintiff excepted.

63 XLIII. The coupons maturing May 1, 1878, on these thirty-six (36) bonds, which were attached to them when Charles R. Lynde, the plaintiff, purchased them, were paid to the plaintiff by Mr. A. Iselin of the firm of A. Iselin & Co., Wall street, New York, upon presentation by the plaintiff of said coupons to said Iselin & Co. in October, 1878, and the thirty-six (36) coupons that matured November 1, 1878, on said bonds, were paid to plaintiff by said Iselin & Co. upon the presentation by said plaintiff of said coupons to said Iselin & Co. in April, 1879. The said A. Iselin & Co. were acting for the receivers and a bondholder committee; the bondholder committee furnishing the money, for taking up said coupons, and being afterwards reimbursed by said receivers. In October, 1879, the plaintiff presented the coupons which fell due May 1, 1879, on said thirty-six bonds, but Mr. Iselin then declined to pay said coupons which was the first knowledge or notice of any kind that the plaintiff ever had of any discrimination against or difference between his said thirty-six bonds and any other bonds of the same series. And plaintiff has never received payment of any coupon on said thirty-six bonds or any of them since the payment to him as aforesaid of the coupons that matured in November, 1878. At the time the May and November, 1878, coupons were paid as above set forth the said A. Iselin & Co. had no knowledge but that the said thirty-six bonds had been regularly issued and sold by the said Columbus & Indianapolis Central Railway Company. To the last six lines of which finding the plaintiff excepted.

XLIV. From the year 1871 until after the purchase by the plaintiff of the thirty-six bonds described in the petition the plaintiff held and owned other bonds secured by the said mortgage

64 of the Columbus & Indianapolis Central Railway Company to Archibald Parkhurst, trustee, described in the petition, being some of the 821 bonds hereinbefore described. The said Columbus, Chicago & Indiana Central Railway Company made default in the payment of the interest coupons upon said 821 due on the first day of May, 1875, and on the first day of November, 1875, and the said interest coupons were not paid until after June 30, 1876, when the same were paid by or on behalf of the said receivers hereinbefore mentioned, all which facts were known to the plaintiff at the time he purchased the said thirty-six bonds described in the petition. To which finding plaintiff excepted.

XLV. At the time of the demand made by the plaintiff upon the said Archibald Parkhurst, trustee, hereinafter set forth, and at the time of the commencement of this action interest coupons which had theretofore fallen due upon more than seven hundred of said one thousand bonds described in said mortgage had been paid. On or about the 27th day of June, A. D. 1891, at Newark, in the State of New Jersey, the plaintiff made a personal request and demand in writing of the said Archibald Parkhurst as trustee, to commence an action for the foreclosure and sale of said premises in accordance with the provisions of said deed of trust, for and on account of the default made by the said The Columbus & Indianapolis Central Railway Company in the payment of the coupons upon the thirty-six bonds described in the petition; and plaintiff then and there offered to the said trustee sufficient security and indemnity to protect him against all expenses and personal responsibility by him to be made and incurred in the commencement and prosecution of an action for the foreclosure and sale of said premises. The said Archibald Parkhurst as such trustee then and there refused to take any action in the matter as requested by the plaintiff.

65 XLVI. The defendant, The Columbus, Chicago & Indiana Central Railway Company and Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, have neglected and refused to pay each of the coupons due upon each of the bonds described in the petition, being coupons from and including coupon maturing May 1, 1879, to and including coupon maturing May 1, 1892, the last two of which coupons have fallen due since the commencement of this suit.

XLVII. On the 1st day of October, 1890, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company made its certain mortgage whereby it conveyed to the Farmers' Loan and Trust Company of New York, and to W. N. Jackson of Indiana, as trustee, for the purpose of securing an issue of bonds to be made by the said Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company to amount in the total of seventy-five thousand bonds at the par value of $1,000 each to be issued as in said mortgage set out and upon the property described in the answer and cross-petition of the said Farmers' Loan and Trust Company filed in this cause including the line of railroad and other property connected therewith, described in the petition of the plaintiff herein, and that said mortgage was duly recorded as required by law in all of the counties in all of the several States through or into which said line runs, and that now and by virtue of said mortgage there have been issued bonds to the total number of 5,318, of said bonds, being the bonds numbered from 1,501 to 6,818, both inclusive and amounting in the total to $5,318,000, and that said bonds are now outstanding and in full force and that no default has been made in the payment of interest thereon.

And plaintiff then and there excepted to the parts of said findings of fact as follows, being designated by the numbers of
66 the paragraphs of said findings, viz: Paragraphs, Nos. 6, 19,

37, 38, 39, the last five lines of paragraph 42; the last six lines of paragraph 43; paragraph 44.

And plaintiff also excepted to the following paragraphs of the finding of fact as irrelevant and immaterial: Nos. 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35.

And, as conclusions of law from the foregoing conclusions of fact, the court finds the equities of the case in favor of the plaintiff; and that the plaintiff is entitled to the relief prayed for in his petition herein.

And that the said thirty-six bonds, described in the petition, and the coupons thereto annexed, are the valid and binding obligations of the Columbus & Indianapolis Central Railway Company and of the Columbus, Chicago & Indiana Central Railway Company.

And that the plaintiff is the owner and holder of the said bonds and coupons, and each of them, as well as the coupons from said thirty-six bonds which accrued and became due from and including the 1st day of May, A. D., 1879, down to and including the 1st day of May, A. D., 1891; and that there is due to the said plaintiff upon the coupons which have heretofore down to the entry of this decree fallen due, computing interest to this, the 9th day of July, A. D., 1892, the sum of forty-seven thousand six hundred and seventy-three and thirty-six one-hundredth- dollars ($47,673.36). And that under and by virtue of the said mortgage or trust deed described in the petition, the plaintiff has a valid and subsisting lien for the security of said bonds and coupons upon the property described in the petition, as of the 1st day of November, A. D., 1864. And is entitled to a decree for the payment of the said sum so found due.

And in the event of the non-payment thereof, that the said
67 property be sold, and the proceeds applied to the payment of said sum, with interest from the date of this decree, and to the payment of the said coupons hereafter accruing, and to the payment of the principal of said bonds.

To each and all of which conclusions of law the said defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company then and there excepted.

And the plaintiff, Charles R. Lynde, having within the time required by law, filed his written motion in this cause to set aside certain of the findings of fact as appears by said motion filed herein, and for a new trial of this cause, the court, upon consideration of said motion, overruled the same; to which the said plaintiff then and there excepted.

And thereupon the plaintiff produced to the court his certain bill of exceptions, and asked that the same be allowed as true, and signed by the court, and ordered to be filed, which was done and ordered accordingly.

And thereupon, this cause coming on further to be heard upon the findings of fact and conclusions of law, the court having found the equities of the case in favor of the plaintiff, it is therefore ordered, adjudged and decreed, that unless the defendant, The Columbus, Chicago & Indiana Central Railway Company, or some person

or corporation for it or in its behalf, shall within thirty (30) days from the date of the entry of this decree, pay or cause to be paid, to the clerk of this court. the costs of this case, taxed at $—, and to the said Charles R. Lynde, the plaintiff herein, the sum of forty-seven thousand six hundred and seventy-three and $\frac{36}{100}$ dollars ($47,673.36), being the amount which the court finds due to said plaintiff upon the coupons which have heretofore fallen due upon the bonds of the plaintiff, described in the petition herein,
68 computing interest on the amount of said coupons to the 9th day of July, 1892, together with interest on said sum from the date of the entry of this decree until such payment be made;

That the said trust deed or mortgage, described in the petition in this cause, dated November 1st, 1864, be foreclosed;

And that all equity of redemption of the said defendant, The Columbus, Chicago & Indiana Central Railway Company, and all claim, interest or rights of all the defendants in this cause hereinbefore named, of, in and to, said mortgaged premises, property, rights and franchises, and every part and parcel thereof embraced or included, or intended to be embraced, in said mortgage, be foreclosed and cut off and forever barred;

And all the property rights and interest conveyed by said deed of trust or mortgage, dated November 1st, 1864, and in said deed and in the petition herein and hereinafter particularly described, shall be sold free, clear and discharged from all claim or interest of the defendants in this cause, or either of them, being the property described as follows: All that certain railway and line of railroad extending from Columbus, in Franklin county, Ohio, to Indianapolis, in Marion county, Indiana, and including the branch from Covington to Union; and its franchises, equipment, property, tolls and interests, that is to say, the lands, tenements, hereditaments, fixtures, goods and chattels of the Columbus & Indianapolis Central Railway Company, and the corporation or corporations, parties to this cause, who have succeeded to or are now in possession of the rights of the said The Columbus & Indianapolis Central Railway Company in said property, its property, rights, privileges, interest and estate of every description and nature, its rails, ties, fences,
69 buildings and erections, its rights of way, cars, engines, tools and machinery, its rents, reservations and reversions of every nature, including all the right and interest which the said The Columbus & Indianapolis Central Railway Company, the Columbus, Chicago & Indiana Central Railway Company, or any of its or their successors, have or possess in said property, together with the benefit of all contracts which said corporations or any of their successors, defendants hereto, have made or by assignment or succession hold.

And in default of the payment of the sum hereinbefore found to be due and directed to be paid, an order of sale shall issue for the sale of said railroad premises and the property rights and interests in the petition herein described, to the special masters hereinafter named and appointed, directing them to expose for sale and sell said mortgaged premises and property at public auction, to the

highest bidder or bidders, at the door of the county court-house of the county of Franklin, State of Ohio, situated at Columbus, in said county and State, on a day and at an hour to be fixed by the special masters herein appointed, in their advertisement of sale, but not later than ninety days after the issuing of an order for sale hereunder; and previous notice of such time and place and the terms of said sale, shall be given by publication by brief general advertisement, referring to this decree and the proceedings in this cause for a more specific description of the mortgaged property herein ordered to be sold, beginning not less than sixty days before the time of said sale, and to be repeated weekly, in one daily newspaper of general circulation in each of the following cities, viz.: the city of Columbus, Franklin county, Ohio, in the city of Indianapolis, Marion county, Indiana; and said special master shall not
70 be required to advertise said sale in any other of the counties save the said counties of Franklin in Ohio, and Marion in Indiana, where the said property is situated or through which said railroad runs.

The said property in these proceedings and hereinabove particularly described, shall be offered and sold as an entirety, appraisement thereof being hereby expressly dispensed with.

The said special masters may, for good cause, shown at the time and place appointed as aforesaid, and thereafter, at the same place, from time to time adjourn or postpone said sale; and may without further notice proceed with said sale on any day to which the same may thus be adjourned.

The said special masters may give such further notice of sale, in addition to the notice above described, as they may think proper.

Said special masters shall not accept any bids for said property from any bidder or bidders for a less sum than four million five hundred thousand dollars ($4,500,000.00) nor from any bidder or bidders who shall not, if requested by said special masters, place in their hands or deposit with them satisfactory pledge that he or they will make good any bid, if accepted by the court, the sum of one hundred thousand dollars ($100,000.)

Of the price for which said property shall be sold, there shall be paid in cash at the time of the sale a sum equal to the amount of the cash deposit hereinbefore required; and also at the same time, or from time to time thereafter, such further portions of the purchase price as the court may direct.

And the court reserves the right to reject any bid, and to take and sell said property upon failure of any purchaser for twenty (20) days to comply with any order of the court requiring payment.

71 The balance of the purchase price not required to be paid in cash, may either be paid in cash, or the purchaser may satisfy and make good said balance of his bid, in whole or in part, by paying over the outstanding bonds secured by said second mortgage of the Columbus & Indianapolis Central Railway Company, and sufficient cash to pay any such outstanding bonds, not so paid over, and the balance of said purchase-money may be paid in the

outstanding bonds secured by said mortgage to W. N. Jackson and the Farmers' Loan and Trust Company, each of said bonds to be accepted for the sum it would be entitled to upon distribution of the proceeds of said sale.

And any bond or bonds or coupons that may be used to make such payments shall be surrendered to the special masters and cancelled, if the whole amount due thereon is applied upon the purchase price; but if less than the whole amount is required, then the amount so applied shall be stamped or written on such bond or bonds, which shall be then returned to the holder.

As soon as any sale shall have been made by the special masters in pursuance to this decree, they shall report the same to this court for confirmation; further certifying to the court compliance by the purchaser or purchasers with the conditions of sale hereinbefore prescribed.

If any bid shall be accepted by the court and the person or persons making the same shall fail to comply with all the conditions of sale and all the orders of the court with respect thereto, the sum deposited by the bidder or bidders shall be forfeited, and shall be applied as the court may direct.

It is further ordered, adjudged and decreed that the fund and proceeds arising from said sale shall be applied as follows:

72 First. To the payment to the clerk of the court of Franklin county, Ohio, of the costs of this suit, including all proper expenses of sale and such compensation as may be awarded by the court to the special masters for making the sale, and to the payment of the charges of the trustees, parties defendant to this cause, and their expense in the execution of their respective trusts, and the performance of their duties as said trustees, if and as the same may be allowed by the court, and such proper allowances as the court may make for solicitors' fees and disbursements and counsel fees on behalf of the respective parties to this cause.

Second. To the payment of the principal and interest of the said bonds of plaintiff of said issue of second-mortgage bonds of the Columbus & Indianapolis Central Railway Company, dated November 1st, 1864, being the thirty-six bonds, for one thousand dollars, and their coupons, hereinbefore described and found to be due, as well as subsequently accruing coupons on said bonds as may become payable on or prior to the date of the distribution of the proceeds herein provided for; and also to the payment of such other of said same series of second-mortgage bonds of the Columbus & Indianapolis Central Railway Company as may be outstanding and unpaid.

Third. To the defendant, The Farmers' Loan and Trust Company, for the benefit of the holders of the said bonds secured by the mortgage set out in its answer and cross-petition herein, or so much thereof as will pay and satisfy the said 5,318 bonds so outstanding as hereinbefore found.

Fourth. The remainder of the proceeds of sale, if any there may be, are to be distributed in accordance with the orders of the court hereinafter to be made.

73 It is further ordered and decreed that Pelatiah W. Huntington of Columbus, and Frank J. Jones of Cincinnati, be and they are hereby appointed special masters to execute this decree; and upon confirmation of the sale hereby directed, to make, execute and deliver to the purchaser or purchasers thereof a deed or deeds of the property sold. And such purchaser or purchasers shall thereupon be invested with and shall hold, possess and enjoy, the said premises and property, and all the right, privileges and franchises appertaining thereto, as fully and completely as the said defendant, The Columbus, Chicago & Indiana Central Railway Company and The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, or either of them, now holds or enjoys, or is entitled to hold and enjoy the same.

And it is further provided, that in case of the sickness, death or absence from said Franklin county, of either one of said special masters, then that the other be and hereby is authorized and empowered to carry out the provisions and directions of this decree.

And further, that said purchaser or purchasers shall have and be entitled to hold said railway and property, and the rights and franchises appertaining thereto, free and discharged from the lien or encumbrance of all the parties to this suit.

To all which conclusions of law, judgment, orders and decree the said defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, then and there excepted.

And the court, upon application of the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, fixes the penalty of the appeal bond to be given herein, in the event of the appeal of this cause, at the sum of five hundred dollars, and

74 afterward and on the same day came the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and gave notice of its intention to appeal this cause to the circuit court.

April Term, July 9th, 1892.

This day came the defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and represents to the court, that it has filed a petition in error in the circuit court of said county to reverse the judgment in said cause, and upon its application the amount of the bond for the stay of execution of the judgment in said cause is fixed at $5,000.

1891, July 3. Petition, aff't and prece. filed. Summons issued to sh'ff of Fr. Co. Ohio (for G. Moody, sect. and treas.), the Columbus, Chicago & Indiana Central Railway Company, and the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Ret. July 13th. Answer August 1st, 1891.

1891, July 3. Affidavit of E. W. Kittridge for publication filed.

1891, July 7. Copies of Ohio State Journal (of July 6th, 1891) containing legal notice addressed and mailed to Archibald Parkhurst, trustee, Newark, New Jersey,. the Union Trust Company, New York city, N. Y., the Farmers' Loan and Trust Company, New York city, N. Y., the Pennsylvania Co., Philadelphia, Pa.,

the Pennsylvania Railroad Company, Philadelphia, Pa. W. N. Jackson, trustee, Indianapolis, Ind., Conrad Baker, trustee, Indianapolis, Ind., Frederick R. Fowler, trustee, Brooklyn, N. Y., Joseph T. Thomas, trustee, Philadelphia, Pa.

75 1891, July 13. Copy of Ohio State Journal (of July 6th, 1891) containing legal notice, addressed and mailed to Archibald Parkhurst, 1003 Broad street, Newark, New Jersey.

1891, July 14. Leave to def't to plead Oct. 1st, 1891. 74–593.

1891, Sept. 9. Answer and cross-pet. of the Farmers' Loan and Trust Co. of New York, filed.

1891, Oct. 14. Leave to def't to file ans. and cross-pet. herein. 78–252.

1891, Oct. 14. Ans. and cross-pet. of the P., C., C. & St. L. R'y Co., filed.

1891, Oct. 16. Reply filed.

1891, Oct. 31. Demurrer of the P., C., C. & St. L. R'y Co., filed.

1891, Oct. 31. Motion of the P., C., C. & St. L. R'y Co., filed.

1891, Nov. 16. Proof of publication filed (Ohio State Journal).

1891, Nov. 16. Depositions on behalf of pl'ff filed.

1891, Dec. 7. Demurrer overruled. Exceptions by def't. Interrogatories to be answered by Dec. 26th, 1891. 79–391.

1892, Jan. 12. Leave to def't to file amendment to answer. 80–232.

1892, Jan. 12. Amendment to answer filed.

1892, Feb. 2. Answer of S. B. Liggett to interrogatories filed.

1892, Feb. 2. Answer of F. H. B. McKnight to interrogatories annexed to pl'ff's reply, filed.

1892, Feb. 29. Depositions on behalf of the P., C., C. & St. L. R'y Co. filed.

1892, March 5. Depositions on behalf of the C., C. & I. C. R'y Co. filed.

76 1892, March 8. Depositions on behalf of def'ts filed.

1892, July 9. Judgment for pl'ff *vs.* def't C., C. & I. C. R'y Co. for $47,673.36. Exceptions. Decree of foreclosure and order of sale. Ex. Bill of exceptions allowed, signed and sealed. Notice of appeal. Bond filed at $500.00. 80–537.

1892, July 9. Motion to set aside certain finding of facts filed.

1892, July 9. Bill of exceptions filed.

1892, July 9. Stay of execution allowed. Bond $500.00. 80–551.

77 STATE OF OHIO, }
County of Franklin. }

Circuit Court.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, Plaintiff in Error,

vs.

CHARLES R. LYNDE, THE COLUMBUS, CHICAGO AND INDIANA Central Railway Company, Archibald Parkhurst, Trustee; The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, The Pennsylvania Railroad Company, W. N. Jackson, Trustee; Conrad Baker, Trustee; Frederick R. Fowler and Joseph T. Thomas, Trustees, Defendants in Error.

Petition in Error.

Plaintiff in error says that it is a corporation duly incorporated under the laws of Ohio.

Plaintiff says, that on or about the 3rd day of July, 1891, the defendant, Charles R. Lynde, commenced his action in the court of common pleas of Franklin county, Ohio, against The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, plaintiff herein, and the said Columbus, Chicago & Indiana Central Railway Company, Archibald Parkhurst, trustee; The Union Trust Company of New York, The Farmers' Loan and Trust Company of
78 New York, The Pennsylvania Company, The Pennsylvania Railroad Company, W. N. Jackson, trustee; Conrad Baker, trustee; Frederick R. Fowler and Joseph T. Thomas, trustees.

Such proceedings were had in said cause, that at the April term of said court, 1892, to wit, on or about the 9th day of July, 1892, the said Charles R. Lynde recovered a judgment against the said plaintiff in error herein for the foreclosure of a certain mortgage described in his petition and an order for the sale of certain property described in his said petition. A transcript of the docket and journal entries in said cause together with the original papers and pleadings are herewith filed.

Plaintiff says, that there is error in the said proceedings, orders and judgment in this to wit:

First. The facts set forth in said petition are not sufficient in law to maintain said action against plaintiff in error.

Second. The said court erred in overruling the motion of the plaintiff in error filed in said cause on the 31st day of October, 1891, to strike out certain matters from the reply in said cause.

Third. The court erred in overruling the demurrer of the plaintiff in error to the interrogatories filed with the reply in said cause.

Fourth. The court erred in each and every one of its conclusions of law in said cause.

Fifth. The said judgment was given for the said Charles R. Lynde when it ought to have been given for plaintiff in error.

Sixth. The said judgment is contrary to law.

79 The plaintiff in error therefore prays that the said judgment may be reversed and that it be restored to all things it has lost by reason thereof.

WATSON, BURR & LIVESAY,
Attorneys for Plaintiff in Error.

Cross-petition of Charles R. Lynde, One of the Defendants in Error Above Named.

Now comes Charles R. Lynde, one of the defendants in error above named, and for his cross-petition in error herein, says that at the April (1892) term of the common pleas court of Franklin county, Ohio, by the consideration of said court, certain findings of fact and conclusions of law were made by said common pleas court, and a certain judgment and decree rendered on said findings of fact and conclusions of law at said term of said court, in a certain cause in said court pending, and being cause No. 25301 on the docket of said court; wherein said Charles R. Lynde, cross-petitioner in error herein was the plaintiff, and the plaintiff in error herein, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, and the other defendants in error to this cross-petition in error above named were defendants; all of which appears in and by the record and proceedings in said cause in said common pleas court.

And this cross-petitioner in error says that in said record and proceedings there was error, of which this cross-petitioner in error complains, in this, to wit:

First. The said common pleas court erred at the trial in admitting incompetent and immaterial evidence offered by the said The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Com-
80 pany, plaintiff in error above named (defendant below), against the objection of this cross-petitioner in error (plaintiff below); to which rulings and to the admission of such evidence this cross-petitioner in error (plaintiff below) at the time excepted.

Second. The said common pleas court erred at the trial in refusing to strike out on the application of this cross-petitioner in error (plaintiff below) incompetent and immaterial evidence offered and read in evidence by the said The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, plaintiff in error above named (defendant below); to which rulings and refusal of the court this cross-petitioner in error (plaintiff below) at the time excepted.

Third. The said common pleas court erred at the trial in excluding evidence offered by this cross-petitioner in error (plaintiff below); to which rulings and exclusion by the court this cross-petitioner in error (plaintiff below) at the time excepted.

Fourth. The said common pleas court erred in certain of its findings of fact, such findings and parts of findings of fact being contrary to law, and not sustained by sufficient evidence and against the weight of the evidence; and were excepted to by plaintiff below at the time, said erroneous findings and parts of findings of fact being those numbered, described and specified as follows, to wit:

Paragraphs of the findings of fact numbered 6, 19, 37, 38, 39; the last five lines of paragraph 42, the last six lines of paragraph 43, paragraph 44, and particularly that part and so much of said findings of fact, as finds that *that* said bonds of the plaintiff, described in the pleadings and findings in said cause, were wrongfully and without the knowledge, authority and consent of the said The Columbus, Chicago & Indiana Central Railway Company, or
81 the said The Columbus & Indianapolis Central Railway Company, applied to the individual use of Benjamin E. Smith, or wrongfully issued or appropriated by him. And particularly so much of those parts of said findings of fact as finds that no part of the proceeds received for said bonds were used for the benefit of the said The Columbus, Chicago & Indiana Central Railway Company or of said The Columbus & Indianapolis Central Railway Company together with such other parts of said findings of fact as the record shows were specifically excepted to by the plaintiff below.

To which erroneous findings and parts of findings of fact above set forth, this cross-petitioner in error (plaintiff below) then and there excepted.

Fifth. Said court erred in overruling the motion and application of this cross-petitioner in error (plaintiff below) (filed in writing in said common pleas court, as the record shows) to set aside said erroneous findings and parts of findings of fact, upon the ground set forth in the written application of plaintiff below to set the same aside; to which ruling of the court in overruling and denying said application of this cross-petitioner in error (plaintiff below) to set aside said findings and parts of findings of fact, this cross-petitioner in error (plaintiff below) then and there excepted.

Sixth. The said common pleas court erred in overruling the objections of this cross-petitioner in error (plaintiff below) to said findings and parts of findings of fact above set forth; to which action of the court this cross-petitioner in error (plaintiff below) then and there excepted.

The original papers, pleadings and files in said cause in said common pleas court, together with a certified copy of the transcript of the docket and journal entries in said cause having been filed
82 in this, the circuit court of Franklin county, O., by the plaintiff in error above named, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, with and as part of its original petition in error in this cause, this cross-petitioner in error refers to said transcript, and said original papers, pleadings and files already on file in the above-entitled cause in this court, and makes them part of this cross-petition in error. And, in addition thereto, this cross-petitioner in error files herewith his bill of exceptions heretofore allowed, signed and filed and made part of the record by and in said common pleas court in said cause.

Wherefore this cross-petitioner in error prays that said findings and parts of findings of fact hereinabove enumerated, set forth and referred to may be reversed and set aside and held for naught; and that this cross-petitioner in error may be restored to all things he may have lost by reason of said erroneous findings and parts of

findings of fact. And this cross-petitioner in error further prays that the said conclusions of law and the said judgment and decree rendered and entered by the said common pleas court below in said cause may be affirmed; and for all other and further relief to which this cross-petitioner in error may be entitled.

KITTREDGE & WILBY,
Att'ys for Charles R. Lynde, Cross-petitioner in Error.

83 *Journal Entries to the Supreme Court.*

In the Circuit Court, January Term, March 9, 1893.

This day came the parties and this cause coming on to be heard upon the petition in error of the said The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the court of common pleas of Franklin county, Ohio, filed therewith and upon the cross-petition in error of the defendant, Charles R. Lynde, together with the bill of exceptions therewith filed and was argued by counsel upon consideration whereof the court find that there is no error manifest in the said proceedings and record in said court of common pleas. It is therefore considered, ordered and adjudged by this court that the judgment and proceedings of the said court of common pleas be and the same are hereby in all things affirmed, to which finding of the court that there is no error in the record and proceedings in the court below prejudicial to the said plaintiff in error and to the order and judgment of this court affirming the judgment of the said common pleas court, the said plaintiff in error, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company excepts. The defendant in error, Charles R. Lynde, excepts to so much of the foregoing finding of the court, and only so much thereof as finds that there was no error in the said proceedings and record in the court of common pleas in the matters set forth and complained of by the defendant in error, Charles R. Lynde, in his cross-
84 petition in error in said circuit court, and the court do further find that there was reasonable ground for this proceeding in error. And it is further considered and adjudged that the plaintiff in error pay the costs of this proceeding in error taxed at $—, and in default thereof execution issue therefor and it is ordered that a special mandate be sent to the court of common pleas, Franklin county, to carry this judgment into execution; to which judgment and order the plaintiff in error excepts. And upon application of the plaintiff in error it is ordered that the undertaking for the stay of execution in this case be given according to law in the sum of $5,000.

(Duly certified.)

85 Supreme Court of Ohio, January Term, 1893.

THE PITTSBURG, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY *vs.* CHARLES R. LYNDE, THE COLUMBUS, CHICAGO AND Indiana Central Railway Company, Archibald Parkhurst, Trustee; The Union Trust Company of New York, The Farmers' Loan and Trust Company of New York, The Pennsylvania Company, The Pennsylvania Railroad Company; W. N. Jackson, Trustee; Conrad Baker, Trustee; Frederick R. Fowler and Joseph T. Thomas, Trustees.	# 3570. Error to the Circuit Court of Franklin County.

Transcript of Docket and Journal Entries.

1893, Ap'l	21	Petition in error and waiver of summons of Chas. R. Lynde filed.
"	"	Appearance of Farmers' Loan and Trust Company filed.
"	"	Affidavit for service by publication filed.
"	"	Circuit court transcript and original papers filed.
"	26	Copies of Ohio State Journal containing notices of publication of commencement of suit of date Ap'l, 1893, sent to Archibald Parkhurst, trustee, Newark, N. J.; the Union Trust Company, New York, N. Y.; the Pennsylvania Company, Pittsburg, Pa.; the Pennsylvania Railroad Company, Philadelphia, Pa.; W. N. Jackson, trustee, Indianapolis, Ind.; Conrad Baker, trustee, Indianapolis, Ind.; Frederick R. Fowler, trustee, Brooklyn, N. Y., & Joseph T. Thomas, trustee, Philadelphia, Pa., by mail, by Josiah B. Allen, clerk.
" May	31	Cross-petition in circuit court taken by Watson, Burr & Livesay.
" June	1	Cross-petition in circuit court returned by Watson, Burr & Livesay.
"	14	Printed record filed.
"	27	Proof of service of printed record filed.
" July	27	Proof of publication filed.
" Sept.	2	Cross-petition in error of Chas. R. Lynde filed.
"	2	Summons on cross-petition in error issued to the sheriff of Franklin Co. for the P., C., C. & St. L. R'y Co. and the C., C. & I. C. R'y Co., returnable Sept. 11th, A. D. 1893.
"	"	Bill of exceptions filed by Jos. Wilby.
"	"	Motion by d'f't C. R. Lynde to dismiss & require printing filed.
"	5	Entry of appearance & waiver of summons of Farmers' Loan & Trust Co. to cross-petition of Chas. R. Lynde filed.
86		
1893, Sept.	9	Summons on cross-petition returned and filed, endorsed: Received this writ on September 2d, 1893, and on September 5th, 1893, I served the within-named The Pittsburg, Cincinnati, Chicago & St. Louis R'y Co. by personally handing to W. W. Medary, the regular freight agent of said company, a true copy thereof, with all the endorsements thereon. I also on the 7th day of September, 1893, served the within-named The Columbus, Chicago & Indiana Central Railway Company by personally handing to Gordon Moody, the secretary and treasurer of said company, a true copy thereof, with all the endorsements thereon. James Ross, sheriff. W. W. Slemmons, deputy. Fees, $1.45.
"	15	Notice of motion by d'f'n't Lynde to dismiss, &c., filed.
		Journal Entry.
" Oct.	10	Motion by defendant to dismiss and to require printing of bill of exceptions in cause No. 3570 on the general docket. "Ordered by the court that said motion be, and the same is hereby, overruled." Order Book No. 13, page 189.
" Oct.	17.	Bill of exceptions sent to E. W. Kittredge.

		Journal Entry.
1893, Oct.	26	"Ordered by the court that the defendant Charles R. Lynde is allowed 60 days in which to file printed record on cross-petition." Order Book 13, page 211.
" Nov.	20	Printed record on cross-petition of Lynde filed.
" "	22	Proof of service of printed record on cross-petition filed.
" "	28	Bill of exceptions returned.
" Dec.	15	Motion by pl'ff for injunction filed.
" "	20	Notice of motion, affidavit, & stipulation filed.
		Journal Entry.
1894, Jan'y	23	Motion by plaintiff for injunction in cause No. 3570 on the general docket. "Ordered by the court that said motion be, and the same is hereby, overruled." Order Book 13, page 297.
" Mar.	14	Bill of exceptions taken by Watson, Burr & Livesay.
" Nov.	14	Suggestion of death of defendant Charles R. Lynde and entry of revivor in the name of the Long Island Loan and Trust Company of Brooklyn, New York, filed.
1895, Mar.	20	Plaintiff's printed briefs filed.
" "	29	Proof of service of pl'ff's printed briefs filed.
1896, "	30	Defendants' printed briefs and proof of service filed.
" Ap'l	2	Proof of service of d'f'ts' printed briefs filed.
" May	26	Plaintiff's printed reply briefs and proof of service filed.
" June	1	Bill of ex. returned by Watson, B. & L.
		Journal Entry.
" "	23	"This cause came on to be heard upon the transcript of the record of the circuit court of Franklin county and was argued by counsel; on consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed, and it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended, taxed at $—."
87		Ordered that a special mandate be sent to the court of common pleas of Franklin county to carry this judgment into execution. Ordered that a copy of this entry be certified to the clerk of the circuit court of Franklin county "for entry." Order Book No. 15, page 30.
1896, June	27	Mandate issued.

STATE OF OHIO, *City of Columbus,* } *ss:*

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing is a true and full transcript of the docket and journal entries as appear in the minute and order books of this office in cause No. 3570, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company *vs.* Charles R. Lynde *et al.*, error to the circuit court of Franklin county, Ohio, and that the same, with the printed volume hereto affixed, is a true and full transcript of the proceedings and record in said cause.

I further certify that said supreme court of Ohio is the highest court of law and equity in the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this thirtieth day of June, A. D. 1896.

[Seal of the Supreme Court of the State of Ohio.]

JOSIAH B. ALLEN, *Clerk.*

87½ [Endorsed:] Transcript of docket & journal entries in the supreme court of Ohio. Fees, $2, paid by Watson, Burr & Livesay.

88 THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY
vs.
CHARLES R. LYNDE *et al.*

1. The bonds of an Ohio railroad corporation, payable in New York city to bearer, are negotiable without endorsement, although sealed with the corporate seal; notwithstanding, that they were made in 1864, while section 1 of the act of 1820 (S. & C. 862), in relation to negotiable paper was in force.
2. Where such bonds are secured by a mortgage on the roadway and other property of the maker, executed to a trustee for that purpose, and are issued at different times, the lien of all the bonds outstanding, in the hands of *bona fide* holders for value, are equal in priority. The lien of each bond dating from the record of the mortgage that secured it and not from the time it was issued.
3. Where such bonds, complete in form, and negotiable by delivery, are placed in the custody of the president of the company, he thereby becomes clothed with an apparent authority of disposition. In such case if the custodian, without the consent or knowledge of the company, wrongfully and for his own benefit, negotiates them, and in due course of business before due, to one who pays therefor their fair value, without notice of any restriction on such apparent power of disposition, the transaction confers upon such purchaser a valid title to the bonds so purchased, and entitles him to a lien against the mortgaged property for their payment.
4. Where such mortgage contains a condition providing that in case the company defaults for more than six months in the payment of interest on such bonds, they shall immediately become due and payable, and such default is made. Query: Whether such default, alone, without any steps being taken by any holder to enforce the provision, is such a dishonor of the bonds as to destroy their negotiability. But whether this default would have such effect or not, if the interest is afterwards paid in full, the negotiability of the bonds is thereby restored.
5. The doctrine of *lis pendens* does not apply to negotiable paper, transferred before due, in due course of business for value.

(Decided June 23, 1896.)

Error to the circuit court of Franklin county.

This action was brought in the court of common pleas of Franklin county by defendant in error Charles R. Lynde against The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Co., plaintiff in error, and others, to recover upon thirty-six bonds of one thousand dollars each, made in 1864 by the Columbus and Indianapolis Central Railway Company, which bonds were a part of a series
89 of one thousand bonds, secured by a mortgage on the roadway and other property of the company by which they were made. The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company by answer denied the validity of the bonds in controversy, setting forth a judicial sale and a series of consolidations of different railroad companies by which the mortgaged property became vested in it, and praying that the title to this property be quieted against the lien claimed on behalf of these bonds. Upon the trial in the court of common pleas of the issues joined between the plaintiff there and the answering defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, the plaintiff prevailed, the court holding that the bonds sued upon were valid obligations of the railway company that made them and a lien upon the mortgaged property in the hands of the answering defendant. The defendant, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, now plaintiff in error, with a view of excepting to the decision, requested the court of common pleas to state its findings of fact separate from its conclusions of law. This was done. The cause was then taken to the circuit court, where the judgment of the court of common pleas was affirmed; whereupon the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company brought the cause to this court for review. The statement of facts necessary to the decision of the case will be found in the opinion of the court.

Watson, Burr & Livesay and Lawrence Maxwell, Jr., for plaintiff in error.

Kittredge, Wilby & Simmons, for defendants in error.

BRADBURY, *J.*:

The contention between the parties assumes a twofold form. One respects the title that the defendant in error acquired to the bonds in controversy. If he acquired no title to them as against the obligor, nor against either of the consolidated companies into which the obligor became merged by the consolidation that afterwards occurred, he must fail in the action. If his title is valid
90 against the obligor or against either of the consolidated companies formed before the bonds were negotiated, then the second contention arises, which relates to the lien claimed for these bonds on the mortgaged property, this property having passed into the ownership of plaintiff in error.

The evidence discloses no marked dispute over the main facts of the case, and the trial court could have encountered no serious

difficulty in ascertaining them. Doubtless, as the defendant in error contends, the evidence submitted to the trial court would have authorized the finding of some additional facts that bear favorably for him upon a general view of the equities of the case, but their character and importance were not controlling, and in the view we have adopted they become immaterial.

The finding of fact made by the court of common pleas was both comprehensive and minute, embracing many circumstances and details formal in their character, though doubtless most of them were indispensible to a determination of the contention between the parties. It covers thirty pages of the printed record. The repetition of only a small part of this statement is required as a basis for our conclusions.

On November 1, 1864, the Columbus and Indianapolis Central Railway Company, a corporation under the laws of the States of Indiana and Ohio, authorized the execution of one thousand of its bonds, each of the denomination of one thousand dollars, payable November 1, 1904, bearing seven per cent. interest, payable semi-annually, the payment of interest being evidenced by coupons attached to the bonds severally. These bonds were duly executed, being signed by the president, attested by the secretary of the company, and the corporate seal attached. They were made payable to William D. Thompson or bearer in New York city. Each bond contained this provision: "This bond shall be transferable by delivery or it may be registered as to its ownership on a registry to be kept by the company, and, being so registered, it shall then be transferable only on the books of the company until released from such registry on said books by its owner. This bond shall
91 not become obligatory until it shall have been authenticated by a certificate annexed to it duly signed by the trustees." The bonds were secured by a mortgage conveying the roadway and other property of the makers to A. Parkhurst in trust for that purpose. It is a certificate of this trustee that is declared necessary to render them obligatory. This authentication was duly made on each bond by the following certificate: "I hereby certify that this bond is one of the series of bonds described in and secured by the deed of trust or mortgage above mentioned. A. Parkhurst, trustee." The statement that the bonds should not become obligatory until thus authenticated is equivalent to a declaration that when duly executed by the company, and so authenticated, their obligatory character shall be complete. They then become perfect in form, and by their express terms transmissible by mere delivery.

Eight hundred and twenty-one of these bonds were duly negotiated on behalf of the company. The remaining one hundred and seventy-nine, of which the thirty-six in controversy were a part, were as early as 1870 placed in the custody of Benjamin E. Smith, the president of the company, and remained in his custody until the year 1875, when, in November or December of that year, he borrowed for his own purposes certain sums of money amounting to $48,000 from W. H. Newbold, Son & Co., a firm of brokers in the city of Philadelphia, for which he executed and delivered to them

his individual notes, and at the same time, falsely pretending to the said W. H. Newbold, Son & Co. that he was individually the owner of said bonds, delivered certain of said bonds, including the thirty-six bonds described in the plaintiff's petition, to the said W. H. Newbold, Son & Co. as collateral security for the payment of his said notes.

Before the negotiation was had, the obligor, The Columbus and Indianapolis Central Railway Company, had by two separate schemes of consolidation become merged into the Columbus, Chicago & Indiana Central Railway Company, which latter corporation, by force of the consolidation had become the owner
92 of the property of the obligor, which was pledged to pay these bonds. Said Benjamin E. Smith, being continuously the president of the successive companies, *and* as such president had the bonds in his custody. This negotiation and pledging of said bonds was had without the knowledge, consent, or authority of said Columbus, Chicago & Indiana Central Railway Company.

Thereafter the said Smith renewed his said notes with the same collateral from time to time until about the 14th day of January, 1878, when the bonds so held as collateral security were sold by the said W. H. Newbold, Son & Co. and the proceeds applied to the payment of said notes and the balance paid over to the said Smith or for his use, and no part of the same was used for the benefit of said railway company.

At the time the said bonds were so pledged to the said W. H. Newbold, Son & Co. all the past-due coupons had been cut off, and while they were so held as collateral security the subsequent coupons as they came due were cut off from the said bonds and delivered to the said Smith, but the same were never presented for payment.

At the sale of said bonds the said W. H. Newbold, Son & Co. themselves became the purchasers of all said thirty-six (36) bonds, paying the full market price at the time of the purchase and buying them in good faith without knowledge of any defect in them or any of them, and thereafter they sent the said thirty-six bonds to New York for sale. Plaintiff, in the months of May, July, and August, 1878, purchased said thirty-six bonds in good faith in the usual course of business for valuable consideration, being about ninety cents on the dollar, which was at the time the usual market price for the bonds secured by said second mortgage, and without knowledge or notice of any of the unauthorized or fraudulent acts of said Smith concerning said bonds, and without any knowledge or notice that said bonds had not been sold by the said Columbus & Indianapolis Railway Company, and thereby became and is now the *bona fide* holder of said thirty-six bonds and the coupons thereto belonging, described in the petition, and that before said thirty-six bonds had been purchased by plaintiff the railway
93 company had not made default in the payment of interest on said thirty-six bonds, and no holder of said bonds prior to said plaintiff had elected that the principal sum thereof should become due.

At the time when plaintiff purchased the said thirty-six bonds the coupons belonging thereto, due May 1, 1878, were still attached to the said bonds and were unpaid.

On or about the 27th day of August, 1878, the plaintiff presented the said thirty-six bonds for registration to the secretary of the Union Trust Company, New York, which company had been therefore designated by said Columbus, Chicago & Indiana Central Railway Company as its registering agent for said bonds in the city of New York, to put the bonds in the name of the party registering them and taking them out of the register and making them to bearer, and the secretary then caused the same to be registered in the name of Charles R. Lynde. At the time of said registration no inquiry was made by the said secretary as to whether or not the said bonds had been regularly issued by the said Columbus — Indianapolis Central Railway Company.

From the year 1871 until after the purchase by the plaintiff of the thirty-six bonds described in the petition the plaintiff held and owned other bonds secured by the said mortgage of the Columbus & Indianapolis Central Railway Company to Archibald Parkhurst, trustee, described in the petition, being some of the 821 bonds hereinbefore described. The said Columbus, Chicago & Indiana Central Railway Company made default in the payment of the interest coupons upon said 821 bonds due on the first day of May, 1875, and on the first day of November, 1875, and the said interest coupons were not paid until after June 30, 1876, when the same were paid by or on behalf of the said receivers hereinbefore mentioned, all which facts were known to the plaintiff at the time he purchased the said thirty-six bonds described in the petition. No authority or consent was ever given by the board of directors of the said Columbus, Chicago & Indiana Central Railway Company to the issue or sale of the said one hundred and seventy-nine bonds or any of them.

94 The title of defendant in error to the bonds in controversy rests upon the facts thus recited. Plaintiff in error contends, among other things, that the facts thus stated show that neither the maker of these bonds nor the consolidated companies into which it became merged consented to the sale or delivery of the bonds, and as an owner cannot be deprived of his property without his consent, no title passed.

It is true that these bonds were negotiated to Newbold and Son without the knowledge or consent of the company; but such consent and knowledge is not indispensible to pass the title to negotiable instruments. Where this class of paper, complete in form and transmissible by delivery, is placed by the maker or owner in the custody of one who is thereby clothed with an apparent power of disposition, and the custodian avails himself of the opportunity thus afforded him to negotiate it to an innocent party, the title of the holder is not to be tested by principles applicable to stolen securities, but by principles properly applicable to the transaction as it actually occurred. That the title to negotiable securities may pass by virtue of such a transaction as the finding of fact shows

occurred in respect to the negotiation of the bonds in question is, we think, clear upon principle and sustained by authority. Railway Co. *v.* Sprague, 103 U. S., 756; Fearing *v.* Clark, 15 Gray, 74.

Independantly of the rules of law designed to protect and give currency to negotiable paper, those principles of natural justice universally applicable to the affairs of mankind, when applied to this transaction, would seem to demand the protection of the defendant in error as against the maker of the bonds and all who stand in its shoes. He was wholly free from fault in connection with the transaction. Each bond contained a declaration of its transmissibility from hand to hand by mere delivery. He found them for sale, before they were due, in the market, where such securities are usually offered for sale, and bought them at their fair market value without notice of any infirmity in their title.

Soon thereafter he took them to the Union Trust Company,
95 in New York city, the agents of the makers, specially appointed to register its bonds, and caused them to be registered in his name on its books. What more could even the highest degree of prudence or diligence demand of him?

The maker of the bonds, a railway company, capable of acting through agents only, placed these bonds in the custody of its president, an agent clothed with high, though possibly not clearly defined powers. The bonds were perfect obligations, bearing on their face a certificate of authentication by the trustee and containing an express declaration of their transmissibility from hand to hand by mere delivery. He was up to and long after the time these bonds were negotiated continued as president of the different consolidated companies as they were successively formed. The companies thus held him out to the world as one who could be trusted to transact matters of importance. Under these circumstances what can be found tending to excite a doubt in the most cautious mind respecting his power to dispose of bonds so entrusted to him?

If the maker of these bonds and those who must abide by its title can shift the responsibility and consequent loss resulting from this transaction from themselves to the holder of the bonds, it must be by the application of some stern rule of law founded upon consideration of public policy.

The contention against the negotiability of these bonds rests upon a statute passed in 1820 (S. & C., 862) and in force when the bonds in question were made and negotiated:

"SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or or[illegible]r, or to any person or bearer, or to any person or assigns, shall be [illegible]otiable by endorsement thereon, so as absolutely to transfer and [illegible] the property thereof in each and every indorsee successively; but nothing in this section shall be construed to make negotiable any such bond, note or bill of
96 exchange, drawn payable to any person or persons alone, and not drawn to order, bearer or assigns."

In 1846 this court, notwithstanding the terms of the statute, held

in Avery *v.* Latimer *et al.*, 14 Ohio, 542, that a promissory note payable to bearer was negotiable by mere delivery, but that a sealed instrument in the same form was not a promissory note and is only negotiable by endorsement. Cushman *v.* Welsh, 19 Ohio St., 536, and Osborn *v.* Kistler, 35 Ohio St., 99, assert the same rule respecting the necessity of an endorsement to transfer title to a sealed instrument in the form of a promissory note payable to bearer.

In Avery *v.* Latimer *et al.*, *supra*, the court was of opinion that the language of the statute just quoted (S. & C., 862) was such that if it had been recently enacted its terms would have compelled them to hold that an endorsement of a promissory note was necessary to its negotiability in all instances whether sealed or not, but in deference to a long-continued practice to the contrary the court held the endorsement to be unnecessary to the transfer of a promissory note (not under seal) payable to bearer.

We think the same considerations based on a similar long-continued practice in regard to railroad bonds, together with the express declaration of transmissibility appearing on the face of the bonds in controversy, and the manifest necessity of the quality of negotiability by mere delivery to their availability to accomplish the object expected of them would require us to hold them to be negotiable by mere delivery, even if of opinion that they were sealed instruments according to the strict construction of that statute; but whatever the court might hold upon the question just suggested may be regarded as speculative, for we are of opinion that the attachment of the corporate seal did not stamp upon them the character of sealed instruments within the meaning placed upon that term by the decisions of this court before cited. Avery *v.* Latimer *et al.*, 14 Ohio, 542; Cushman *v.* Welsh, 19 Ohio St., 536, and Osborn *v.* Kistler, 35 Ohio St., 99. In those cases the instruments were made by natural persons, who signed their names and also affixed
97 or adopted a private seal, thereby man-festing a purpose to place them in the class of sealed instruments, and the court dealt with them according to the character thus expressly stamped on them by the parties.

In the case of railroad or other corporate securities, however, the attaching of a corporate seal bears a strong anaolgy to the signature of a natural person, and is its substantial equivalent. In view of the vast sums of money represented by this class of securities and of the existence of a practice of passing them from hand to hand by delivery so universal and long continued as to be within the common knowledge of every one, they should not be shorn of this valuable attribute on this account unless the words of the statute and the former decisions of this court imperatively require it, which we do not think they do. Besides, the bonds in question are payable in New York. The contract was to be performed there. All parties must be deemed to have had the law of the place of the performance of the contract in view, and we are cited to no statute or decision of the courts of that State that take- from these bonds the quality expressly given them in direct terms of transmissibility

by delivery. We therefore hold the bonds to have been negotiable by delivery.

This payment of the overdue interest was made more than two years before the purchase by defendant in error of the bonds in controversy.

Even if the holders of the bonds were chargeable with notice of this provision in the mortgage (no such provisions appearing on the bonds) and that provision was self-operating, so that a mere default of six months in the payment of an installment of interest dishonored the bonds by making them overdue, this taint should be regarded as removed by a subsequent payment of interest to the acceptance of all the bondholders, and thereafter the quality of negotiability should be deemed to be restored.

We are therefore of opinion that the title of defendant in error to the bonds in controversy is valid.

98 We now come to the question respecting the lien claimed for these bonds upon the property mortgaged to secure them, which property has passed into the ownership of plaintiff in error.

At the time Lynde purchased the bonds in controversy and for some years before he owned some of the eight hundred and twenty-one conceded to have been genuine. In 1875, more than two years before Lynde purchased those in controversy, default was made in the payment of interest on those that were genuine, and, as Lynde owned some of them, he was chargeable with notice of such default.

This default, it is claimed, rendered them overdue and therefore dishonored.

It is true that the mortgage by which the bonds were secured contained the following provision: "And it is further agreed by the party of the first part that in case the said company for the term of six months shall make default of the payment of its interest warrants or any of them, then the whole principal money contained in said bonds shall become due and payable."

The default consisted of the non-payment of the interest due for May and November, 1875, and continued until June 30, 1876, a period of more than six months. The entire interest, however, was paid on the day last named. In the meantime no steps were taken to enforce any rights growing out of this default.

The case of Baily *v.* Smith, 14 Ohio St., 396, is cited by plaintiff in error as decisively determining the question of the lien of the bonds in controversy upon the mortgaged property adversely to the claim of a lien. We are not disposed to depart from the doctrine established by that celebrated case. It has become a rule of property in this State that should not be lightly disturbed and is founded upon considerations that appeal strongly to feelings of natural justice.

That case does not deny the right of a *bona fide* holder of negotiable paper to enforce it against the maker, though the latter may have been induced by fraud to make or part with it; but it

99 does deny the right of such holder to enforce a mortgage

given to secure such paper if the mortgage also was procured by fraud. In that case the note and mortgage were both procured from the maker by fraud, and that circumstance is the predicate of the decision. What the decision might have been if fraud had intervened only in respect to one of the two instruments present in that case is a subject about which we may speculate and upon which different minds might reach opposite conclusions. The reasoning of the learned judge, as I gather it from his opinion, leads me to the belief that he would have reached the same conclusion had the mortgage alone been tainted with fraud, but possibly to a different one if the mortgage had been free from fraud though the note was so tainted.

However this may be, there are considerations growing out of the nature of the transaction in that case that distinguish it from the one under consideration. That transaction occurred between private persons and consisted of a single note secured by a mortgage on a tract of land. The learned judge, having in view those circumstances, said: "Now, mortgages are not necessities of commerce; they have none of the attributes of money; they do not pass in currency in the ordinary course of business. They are securities or documents for debts used for the purpose of investments and unavoidably requiring from those who would take them with prudence and safety an enquiry into the value, condition, and title of the property upon which they rest, nor have we the least apprehension that commerce will be impeded by requiring the further enquiry of the mortgagor whether he pretends to any defense before a court will foreclose his right to defend against those which have been obtained by force or fraud. * * * A long experience has demonstrated that they are not necessary instruments of active trade and business, and we but follow in the footsteps of the ablest and wisest judges when we say that the harsh rule which excludes equities and often does injustice for the benefit of commerce should not be applied to them. * * * If they are assigned either expressly or by legal implication the assignee takes only the interest the assignor had in the instrument." * * *

This language and course of reasoning, perfectly appropriate to the transaction then under consideration, would be strongly out of accord in discussing the principles that should determine the rights of *bona fide* holders of railroad bonds. These latter are instruments of trade and commerce in the broad sense of those terms. They are designed for sale in the money markets of both Europe and America; they are made payable to bearer for the express purpose of facilitating their negotiability. In the case of the bonds under consideration they declare on their face the fact of their transmissibility by mere delivery. The mortgage is made to a trustee for the benefit of every bond into whomsoever's hand it may chance to pass. These holders do not and cannot make such specific enquiry and examination in the condition of the mortgaged property as may be made by a purchaser of a note and mortgage under the circumstances supposed by the learned judge.

It might be entirely practicable and the dictates of prudence

might require of one about to purchase a note and mortgage of the mortgagee that he enquire of the maker the circumstances under which they originated, but to require this enquiry of one who in a distant city is about to purchase a railroad bond offered for sale in the market would be to defeat the purpose for which they were designed. Therefore we do not think the case of Baily *v.* Smith, *supra*, applicable to the case under consideration.

The roadway and other property pledged by the mortgage to secure the payment of these bonds subsequent to the making of the mortgage passed by two successive railway consolidations—one made in 1867, the other in 1868—into the ownership of a corporation known as the Columbus, Chicago & Indiana Central Railway Company. This latter railway company by the consolidations mentioned thus became the owner of the property pledged for the payment of the bonds in controversy, as well as of the property of its other constituent companies. The new company executed a mortgage on its entire property—one in February, 1868, the other in Decem-
101 ber of the same year. Under the first of the two bonds to the amount of about ten million dollars were issued, and under the other bonds aggregating less than five million dollars were issued. These two mortgages were duly recorded and no question is made respecting their validity. In 1869 the roadway and property of this consolidated company was leased for a term of ninety-nine years, renewable forever, to the Pittsburgh, Cincinnati and St. Louis Railway Company, and on or about February 1, 1869, the latter company went into possession and continued to occupy and operate the road until after its sale in 1883 upon the foreclosure of the two last-mentioned mortgages.

In 1875 actions were begun in the circuit court of the United States for the southern district of Ohio, in the circuit court of the United States for the district of Indiana and for the northern district of Illinois, by the trustees in the first of the two last-named mortgages to foreclose the same, to which action the Columbus, Chicago & Indiana Central Railway Company (the consolidated company that made the two last mortgages), the trustee in the mortgage last made, and the trustee in the mortgage made to secure the bonds in controversy were each made parties. Receivers were appointed by the court, to whom the consolidated company (the Columbus, Chicago & Indiana Central Railway Company), on May 25, 1875, conveyed the entire property covered by the mortgages pursuant to an order of court made in the actions, but subject to the right of the lessee of the road to continue in its possession, control, and management. This deed was not recorded, and the defendant in error, Lynde, had no actual knowledge of its existence until 1891. In November, 1882, decrees were rendered in these actions for the sale of the mortgaged property. By the terms of this decree the entire interest that the Columbus, Chicago & Indiana Central Railway Company, the mortgagor in the two last mortgages, had in the mortgaged property, and all the rights of the mortgagees in the two last mortgages, were ordered to be sold, free

from all liens acquired during the litigation, but the decree
102 expressly provided that it should not affect or prejudice prior liens, one of which was the mortgage made in 1864 to Parkhurst, to secure the one thousand bonds of which the thirty-six involved in this action are part.

In February, 1883, the property was sold under this decree to William L. Scott and his associates, who shortly thereafter conveyed it to the Chicago, St. Louis & Pittsburgh Railroad Company. By a consolidation of this company with the Pittsburgh, Cincinnati & St. Louis Railway Company, the lessees of the road, the plaintiff in error was formed and thereby became vested with the property embraced in the mortgage made in 1864 to secure the one thousand bonds which, as we have seen, included those in controversy.

If the equities of the defendant in error growing out of the circumstances before noticed under which the bonds in controversy were negotiated were so clearly and materially stronger than those favorable to the company that made and the company that suffered them to be thus negotiated as to authorize a decree declaring them to have a lien upon the property originally pledged for their payment, what circumstance appears in the proceedings by which this property came into the ownership of plaintiff in error that should operate to destroy this lien? The defendant in error is not chargeable with any actual neglect or omission of diligence in connection with the matter nor of any actual notice of the proceedings.

The several transfers of the property caused by the different railroad consolidations would not affect the lien, for the statutes authorizing them expressly provides that "all rights of creditors and all liens upon the property of either of such companies shall be preserved unimpaired, and the respective companies may be deemed to be in existence to preserve the same; and all debts, liabilities, and duties of either of said companies shall forthwith attach to the new company and be enforced against it to the same extent as if such debts, liabilities, and duties had been contracted by it."

103 Smith, who wrongfully negotiated these bonds, continued to be president of the several companies upon their successive consolidations until about the time of the judicial sale before mentioned, and each of them therefore became successively liable for what they carelessly suffered him to do in this matter. The circumstance that the particular railroad company that executed the mortgage and made the bonds under consideration went out of active existence before the bonds in controversy were negotiated by Smith becomes wholly immaterial in the light afforded by the provisions of this statute. The consolidated corporation succeeds not only to every debt and liability of each constituent company, but to their duties also. It therefore succeeded to all the duties pertaining to these unissued bonds that rested upon the company by whom they were made.

Respecting the effect that the judicial sale should have upon this lien independently of the rule of *caveat emptor* that is applied to purchasers at such sales, the sale under consideration was made under a decree that expressly provided that the lien of the mort-

gage that secured these bonds was not to be affected or prejudiced by the decree or sale. It is true that the purchasers at the sale supposed these bonds had not been negotiated, but they knew a thousand of the bonds had been authorized and that their form was such that they would pass from hand to hand by mere delivery, and made no enquiry at all about them. Their production and cancellation could have been demanded, and, in prudence, should have been. If their production had been demanded the fact that they were outstanding would have been revealed and the lien of the holder preserved. One who neglects so obvious a precaution should abide the consequences.

The same considerations apply to the conveyance afterward made by the purchaser at the judicial sale to the Chicago, St. Louis and Pittsburgh Railroad Company. If the purchase by Scott and his associates is not to be regarded as really made on behalf of the company to which the property was afterward conveyed,
104 nevertheless the latter received the deed without enquiry concerning the bonds in question, and it is chargeable with notice of the existence of the mortgage, the character of the bonds it secured, and that they might be outstanding in the hands of innocent purchasers.

Upon any adjustment of the equities growing out of the transaction we discover no circumstance that relieves the plaintiff in error from the rule of *caveat emptor*.

The doctrine of *lis pendens*, however, is invoked to defeat the lien of defendant in error.

In November or December, 1875, when the bonds in controversy were pledged by Smith for his personal obligation, and afterward, in 1878, when the defendant in error bought them, the actions heretofore referred to, brought in February, 1875, to foreclose the subsequent mortgages *was* pending, and the property had been placed in the hands of receivers. Under the doctrine of *lis pendens* plaintiff in error insists that the purchaser of the bonds was chargeable with notice of these actions and during their pendency could acquire no lien upon property in the hands of the court. These actions were pending in the United States court in Illinois, Indiana, and Ohio. While they embraced the property pledged to secure the payment of bonds in controversy, no relief was sought or obtained in respect to these bonds. In view of this circumstance and of the knowledge of their existence which, we have seen, should be imputed to the purchaser at the judicial sale and to plaintiff in error and their omission to call for the production and cancellation of any bonds that might not have been negotiated would make the application of the doctrine of *lis pendens* to the defendant in error extremely harsh even if the bonds were not negotiable. However, as the doctrine of *lis pendens* does not apply to negotiable paper purchased before due in due course of business, that question requires no further consideration. Stone *v.* Elliott, 11 Ohio St., 252.

The bonds in controversy were not negotiated until 1875, and if their lien dates from that event the two issues of bonds under
105 the subsequent mortgages would be entitled to a prior lien

on the property, and the ag-regate amount of those two subsequent issues was greater than the sum realized from the sale of the property under the decree of for-closure. If all that was true, the defendant in error would be entitled to demand a resale of the property, for the mortgage made to secure his bonds was not affected by the decree and sale under which plaintiff in error claims title; but the date of the lien of the bonds does not depend upon the date of their original negotiation. The entire series stand upon a footing of exact equality in this respect. The first one issued has no better or earlier lien than the last one. To distinguish between and give priority of lien among a series of railway or other bonds secured by the same mortgage and in the hands of different *bona fide* holders according to the time each may have been issued would contravene the manifest design of the maker. It would also be wholly impracticable, leading to interminable disputes, besides stamping upon each bond a doubt respecting the share of the proceeds of the mortgaged property that would be applied to its payment. If issued early, it would be paid in full, perhaps; if late, it might receive nothing.

The several propositions urged upon our consideration to defeat the claim of defendant in error we find to be unsound in principle or inapplicable to the facts as they were found by the court of common pleas.

Judgment affirmed.

SPEAR, *J.*:

I dissent from the judgment of affirmance. My point is that after a railroad corporation has become merged in a new company by consolidation with other companies it has not power to issue bonds, and thereby create a lien on the property of the new company, even though the bonds had been duly signed and a mortgage executed and recorded before the consolidation purporting to secure payment of the bonds. That is this case, as is shown by the sixth finding of fact, at page 49 of the printed Record, taken in connection with the findings recited in the majority opinion.

106 Office of supreme court reporter.

COLUMBUS, OHIO, *June* 30, 1896.

I do hereby certify this to be a true and correct copy of the opinion in the case of The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company *vs.* Charles R. Lynde as the same appears on file in my office.

E. O. RANDALL, *Reporter.*

Endorsed on cover: Case No. 16,331. Ohio supreme court. Term No., 552. The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, plaintiff in error, *vs.* The Long Island Loan and Trust Company, executor of the last will and testament of Charles R. Lynde, deceased. Filed July 8th, 1896.

U. S. 552. 96.

Brief of Burr for P. C. Co

No. 552.

Filed Oct. 15, 1896.

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OCT 15 1896
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY,
Executor of Charles R. Lynde, Deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

COLUMBUS, OHIO.
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THE LONG ISLAND LOAN AND TRUST COMPANY,
Executor of Charles R. Lynde, Deceased,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ON MOTION TO DISMISS THE WRIT OF ERROR.

This was a foreclosure suit brought in 1891, in the Common Pleas Court of Franklin County, Ohio, by Lynde, who claimed to be the owner of thirty-six of the second mortgage bonds of The Columbus & Indianapolis Central Railway Company for one thousand dollars each, dated November 1st, 1864, together with the semi-annual interest coupons, maturing May 1st, 1879, and thereafter, secured by mortgage on the railway, extending from Columbus, Ohio, to Indianapolis, Indiana, which is now owned by plaintiff in error, The

Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

The petition (printed record, p. 6), made defendants with others, Archibald Parkhurst, trustee of the bonds, The Columbus, Chicago & Indiana Central Railway Company, corporate successor of the alleged maker of the bonds, and the plaintiff in error here, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

Parkhurst and the C. C. & I. C. Ry. Co. made default.

The P. C. C. & St. L. Ry. Co. answered (p. 12 and 23), denying that the instruments in question were ever made or issued by the alleged maker or either of its corporate successors, and denying that they ever became a lien upon the railway property.

The answer further set out the proceedings in a former foreclosure suit in the U. S. Court for Ohio and Indiana, in which the railroad was sold and the property thereafter passed by successive conveyances to its present owner, the answering defendant.

The answer further averred that the alleged lien of the plaintiff, if acquired at all, was acquired during the pendency of that foreclosure suit, and while the railroad was in the custody of the Court by its receivers, and by virtue of the proceedings and sale in that suit such pretended lien was extinguished.

By this answer the plaintiff in error claimed the legal effect of the decree of foreclosure and sale to be the extinguishment of plaintiff's alleged lien on its property.

To this answer a reply was filed in the nature of a general denial, and further alleging that Lynde was a bona fide purchaser for value without notice (p. 20).

The Trial Court found in favor of the plaintiff's lien, and decreed a sale of the road for the payment of his bonds. The Court found the facts and its conclusions of law separately, and to review the questions of law the question was taken to the State Circuit Court and to the Supreme Court where the judgment of the Trial Court was affirmed in the opinion forming part of the record (page 54).

The State Court thus denied to the decree and proceedings in foreclosure of the Federal Courts the legal effect claimed for them by the plaintiff in error, and made a case where a title or right is claimed under an authority exercised under the United States, and the decision of the State Court was in denial of the title or right so asserted.

The jurisdiction of this Court to review the decision of the State Court in such case seems clear.

Embry v. *Palmer*, 107 U. S., 3.
Dupasseur v. *Rochereau*, 21 Wal., 130.

So far as the motion at bar proceeds upon the ground that no federal question is involved, we think it is not well taken.

A consideration of the other ground of the motion, to-wit: whether the question is frivolous, requires a brief history of the case as it appears in the record.

On the 1st of November, 1864, the Columbus and Indianapolis Central Railway Company, a corporation of Ohio and Indiana, prepared, signed and sealed its one thousand bonds of $1.000.00 each, payable to William D. Thompson, or bearer, on the 1st day of November, A. D. 1904, with coupons annexed for the

semi-annual interest, and to secure their payment, executed a second mortgage upon its entire line from Columbus to Indianapolis, to Archibald Parkhurst, Trustee. (p. 24, 25).

Shortly after the one thousand bonds of the issue in question were signed and sealed, they were all duly certified by the trustee, and prior to January 1, 1867, seven hundred and ninety of them had been exchanged as provided in the mortgage, and thirty-one had been duly sold. (p. 31). The remaining one hundred and seventy-nine bonds, including all of the thirty-six bonds in suit, had been sometime prior to 1870 delivered by Parkhurst, the Trustee, to B. E. Smith, as President of the Company, and remainded *unissued* in his possession as president of the maker company and of the companies into which it was afterwards consolidated, until November and December, 1875. (p. 31).

In September, 1867, the Columbus and Indianapolis Central Railway Company, maker of the bonds, was consolidated with other roads into and became the Columbus and Indiana Central Railway Compaay, (p. 31), and again in February, 1868, this latter company was consolidated with another, and became the Columbus, Chicago and Indiana Central Railway Company, one of the defendants, which we will hereafter designate as the C., C. & I. C. Co. (p. 31, 32).

On the 20th of February, 1868, the C., C. & I. C. Co. made its mortgage on its line, including the property in question, to Roosevelt & Fosdick, trustees, to secure an issue of $15,000,000.00 of bonds, of which bonds to the amount of more than ten million dollars were sold. (p. 32).

About the 15th of December, 1868, the same company made another mortgage to Fowler & Thomas, Trustees, to secure an issue of $5,000,000.00 of bonds. (p. 32). This mortgage recited that the company was indebted for outstanding second mortgage bonds of the Columbus and Indianapolis Central Railway Company in the sum of $821,000.00, and bonds of the $5,000,000,-00 issue were to be set aside, appropriated and used for the sole purpose of taking up these and certain other specified bonds. (p. 32).

The 821 bonds above mentioned were those secured by the Parkhurst mortgage in question, and which were all of that issue which had been put out. (p. 32).

About the 22nd day of January, 1869, the C., C. & I. C. Ry. Co. leased its entire line to the Pittsburgh, Cincinnati & St. Louis Ry. Co. for 99 years, renewable forever, which latter road took possession and operated it until the sale under foreclosure, mentioned hereafter. (p. 33).

The lease provided that out of the rentals there should be paid the interest on the $15,000,000.00 and the $5,000,000.00 issue, and upon certain income bonds thereafter to be issued not to exceed $2,000,-000.00. (p. 33).

It was further provided in the lease that no issue of bonds beyond the three last named should be made by the lessor company without the consent of the boards of directors of the respective parties to the lease. (p. 31). Thereafter no consent was ever given by the board of directors of C., C. & I. C. Co. to the issue or sale of the one-hundred and seventy-nine bonds (which

include the plaintiff's thirty-six) or of any of them. (p. 34).

On the 1st and 2nd days of February, 1875, in the U. S. Circuit Courts for Ohio, Indiana and Illinois, Roosevelt and Fosdick, trustees, commenced actions for the foreclosure of their mortgage, making the Railway Company and the Trustees under the Fowler and Thomas mortgage, and others, defendants, but not making Parkhurst a party in respect to his prior mortgage, and not seeking to have the road sold free of the Parkhurst mortgage in question. (p. 34). At the same time the plaintiffs moved for the appointment of a receiver or receivers to take possession of the property, and out of the rentals to pay the interest on the bonds issued under their mortgage and the underlying mortgages, etc. (p. 34).

On the 2nd and 3rd of February, 1875, Roosevelt and Fosdick were themselves appointed receivers, and the Railway Company was ordered by the Court to forthwith transfer and convey to the receivers all the mortgaged premises which was done on the 25th of May thereafter. (p. 35).

It is important to have the situation at this point definitely fixed in the mind.

The one hundred and seventy-nine bonds, including the thirty-six in suit, had never been issued or delivered to any one, and the intention to use them had been abandoned. The maker had long since gone out of existence by the consolidations of 1867–8.

A mortgage (to Fowler and Thomas) had been put upon the property, subject to the lien of the 821 issued bonds, and no more. In the lease, the lessor company

had provided for the payment, by the lessee, of the interest on these 821 bonds, and had bound itself not to issue any more bonds of any sort without the consent of the board of directors of both companies, which was never given. Beyond this, the property was now in the custody of the law by proceedings of which all the world was bound to take notice. Under those proceedings the legal title to all the property had been conveyed to the Receivers to protect it from any disposition to the prejudice of the Roosevelt and Fosdick mortgage and the holders of bonds thereunder. The Court had taken it into its possession for that express purpose.

The situation above set forth continued until the months of November and December of that year (1875), in which month one B. E. Smith, who had during this time been President of the C., C. & I. C. Co., and its predecessors, borrowed upon his own notes, and for his own purposes, the sum of $48,000 of the Newbolds in Philadelphia, and needing collateral for the same, he resurrected these one hundred and seventy-nine unissued bonds, cut off and suppressed all past due coupons, and falsely pretending to the Newbolds that they were his individual property, pledged a part of them, including the thirty-six in suit, as collateral security for his loan—all without the knowledge or consent of the Railway Company. (pp. 37–38.)

Smith renewed his notes from time to time, receiving from the Newbolds the coupons as they came due, and suppressing them, till January 14, 1878, when the Newbolds, under their collateral contract, sold the bonds,

applying the proceeds to the payment of the loan, and paying the balance to Smith.

No part of the proceeds was ever used for the benefit of the Railway Company. (p. 38.)

The Newbolds themselves bought the bonds, and soon after sent them for sale, to New York, where plaintiff, in May, July and August, 1878, bought them in the usual course of business, without any knowledge of their infirmity. (p. 38.)

Soon after his purchase, August 27, 1878, the plaintiff caused them to be registered in his name by the Secretary of the Union Trust Company, the Registrar, who made no inquiry with regard to their origin. (p. 39.)

Afterward, A. Iselin & Company, acting for the receivers and for the bondholders' committee, paid Mr. Lynde the coupons for May 1, and November 1, 1878, having no knowledge at the time, that these bonds had not been regularly issued by the Railway Company. The money to pay the coupons was furnished by the bondholders' committee, who were afterwards reimbursed by the Receivers. (p. 39.) Before another coupon was presented for payment the fraud came to light and when plaintiff, in October, 1879, presented his coupons due May 1, 1879, for payment, he was refused. And this was the first knowledge he had that all was not right with these bonds. (p. 39.)

From 1871 until plaintiff purchased the bonds in question, he held some of the 821 valid bonds of this issue, on all of which the Railway Company defaulted in payment of the interest due May and November, 1875, and it was not paid till after June 30, 1876, when it was paid by the Receivers, all of which facts were

known to the plaintiff when he purchased the bonds in question. (p. 39.)

No further change occurred in the situation, and on the 15–23 days of November, 1882, decrees of foreclosure were entered in the Roosevelt and Fosdick suits for the non-payment of the interest on their bonds. (p. 35.)

In the decree of foreclosure it was ordered that the property be sold subject to the outstanding sectional bonds prior in lien to the Roosevelt and Fosdick mortgage, and to all other paramount liens thereon, but free from the liens then represented by any party to the cause, and that the purchaser should hold, possess and enjoy said property "*as fully and completely as the said Columbus, Chicago and Indiana Central Railway Company at the commencement of said suit by said Roosevelt and Fosdick held or now holds and enjoys, or is entitled to hold or enjoy the same.*" (p. 36.)

And it was further decreed that by the sale to be made, "the defendants in said suits respectively, and all persons claiming or to claim under them or any of them, *subsequent to the beginning of said suits* by the said Roosevelt and Fosdick *as purchasers, incumbrances or otherwise* howsoever, should be and that they thereby were forever barred and foreclosed of and from all right, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold, and every or any part thereof." (p. 36.)

The property was duly sold, the proceeds being insufficient to pay the bonds issued under the Roosevelt

and Fosdick mortgage, and, of course, not reaching the bonds issued under the Fowler and Thomas mortgage. (p. 36.)

Afterwards by successive conveyances and a consolidation, the property duly came into the possession and ownership of the P., C., C. & St. L. Railway Company, Plaintiff in error. (p. 36-37.)

The defendant below, The P., C., C. & St. L. Ry. Co., having acquired the title to the property, stood in the shoes of the purchaser at the judicial sale, and was entitled to defeat the claim of the plaintiff against its property—the only matter in which it was interested—by showing either that the bonds were not valid obligations, or that the holder, plaintiff below, was not entitled to a lien upon the property of plaintiff in error for their enforcement.

Jones on Corporate Bonds and Mortgages, sec. 683.

Hackensack Water Co., v. *DeKay*, 36 N. J. Eq. 548, 555.

From the foregoing statement of facts it appears that when the foreclosure suit of Roosevelt and Fosdick was begun, and the road went into the hands of the receivers, the property was encumbered by the lien of the Parkhurst mortgage to the amount of $821,000. and no more.

The decree and the deed made in pursuance of it undertook to convey the property encumbered by no greater burden than it bore at that date. That this was the intention of the decree, is manifest. The outstanding sectional bonds, prior in lien to the Roosevelt and Fosdick mortgage mentioned in the decree and subject

to which the road was sold, were the 821 Parkhurst bonds. The decree undertook to invest the purchaser with the property as fully and completely as the Columbus, Chicago & Indiana Central Railway Company at the commencement of the suit by Roosevelt and Fosdick, held the same and all persons, claiming under the Company subsequent to the beginning of that suit as purchasers, incumbrancers or otherwise were forever barred etc.

Under no theory did the bonds in suit become an incumbrance on the property till they were hypothecated by Smith eight months after the property was taken in hand by the receivers.

The simple question in the case then is, was the seizure of the sroperty by the Court and placing it in the hands of its officers, the receivers, effectual to protect it from a new and additional burden, or if as against the Railway Company a lien was acquired by the issue of the bonds during the receivership, was that lien cut off by the decree and sale.

Counsel for defendant in error, in their brief in support of the motion to dismiss, cite several cases to the effect that the doctrine of *lis pendens* does not apply to commercial paper. Counsel for the Railway Company have never questioned that proposition. But the case at bar is not one of commercial paper merely, but is a case of commercial paper secured by mortgage on real property. Mr. Lynde did not begin the action as the holder of bonds to enforce their payment against the maker or its corporate successors, but on the contrary, the object of the suit was solely to reach and

subject to their payment the real property, claimed to have been pledged for their security, but which had been seized by a Court of Chancery before their issue, and afterward duly sold to the predecessor in title of the plaintiff in error.

The plaintiff in error is not concerned with the rights of Mr. Lynde's Executors as the holders of commercial paper, but is defending its title to the real estate so acquired. It might be conceded that, notwithstanding the theft or embezzlement of the bonds by Smith and their unlawful hypothecation, the innocent holder could recover upon them in an action at law. We might also concede upon the principle announced in the case of *Carpenter* v. *Logan* 16 Wal. 271 that as against the maker of the bonds he might have enforced the lien of his mortgage for their security. But this does not meet the question, viz.: Whether as against the Court of Chancery which took the railroad into its possession for the sole purpose of preserving it, as it then stood, to answer the claim of its suitor when finally established, could the property in any manner without the consent of the Court, be thereafter encumbered by further burdens having priority over the seizure and defeating its object?

Upon this, the sole question, as we understand it, presented by the record, the cases cited by our opponents (Brief p. 7), seem to furnish no light, and in all the discussions of this case, no authority has yet been found supporting the affirmative of the above proposition.

FIRST.

The purpose and general effect of appointing receivers are of course elementary. By it the Court takes the subject matter of the litigation out of the control of the parties and into its own hands, and holds it pending the proceedings and until the final disposal of all questions legal or equitable, involved in the action. The property is a fund in Court to abide the event of the litigation, and if the creditor succeeds in establishing his right to the application of the fund it is the duty of the Court to see that such application is made. To effectuate this the Court will administer it independently of any rights acquired by third persons pending the litigation.

Wiswall v. *Sampson*, 14 How., 52.

Various devices have been resorted to by the debtor and his creditors to thwart this purpose of the Court and render ineffectual its attempt to administer the property for the benefit of those entitled to it at the time of its seizure, but such devices have uniformly proven fruitless and the ability of the Court to protect the property for its suitors has in each instance been established. The receiver cannot be disturbed in his possession of the property, no lien by judgment or attachment can be acquired upon it, the receiver cannot be garnisheed, a creditor's bill will not lie against him, no interest can be acquired in the property by act of the debtor, even by an innocent purchaser.

Wiswall v. *Sampson*, Supra.

In the latter case this Court held that while the property was in the hands of a receiver a sale by the marshal upon execution and a paper levy was absolutely void and conferred no title, even conceding the lien of the execution creditor superior to the claim of the creditor who filed the bill and procured the appointment of the receiver.

The corporation is incapable of annexing any lien to its property or of creating any equity against it after it has passed into the hands of a receiver.

Thompson Com. on the Law of Corporations, Sec. 7013, 7060, 7015.

In *Railway Co.* v. *Lewis*, 81 Tex., 1, it is held that after the receiver is appointed the property being *in custodia legis* no lien can follow the property as against the purchaser at the foreclosure sale which did not exist at the commencement of the foreclosure suit.

In *Jackson* v. *Laha*, 114 Ill., 287, the Court say page 295: it would seem an anomaly that a lien adverse to the rights of the receiver could be obtained so as to control the distribution to be made of the fund, "Obtaining a lien implies it may ultimately take the property or funds to which it attaches, and if that could be done in this case it would withdraw the same from the custody of the law or from what is the same thing the custody of the receiver having the same in possession."

Again when in a suit for the foreclosure of a railroad mortgage a court of chancery appoints a receiver there is a seizure of something more than the mere tangible property and credits. The *franchises* of the corporation become vested in the receiver and thereafter are exercised by him under the orders of the

Court. The corporation is not dissolved; it still has a naked existence but this primary franchise viz.: the right to exist as a corporation is all that is left to it.

Thompson Commentaries on the Law of Corporations, 7002.

Central Trust Co. v. *New York, &c., R. R. Co.*, 110 N. Y., 250.

In the latter case, a foreclosure suit in which a receiver had been appointed, Peckam J., held that in such case the receiver as an officer of the Court exercises the franchises which have been conferred upon the corporation by the State and that through the Court he acts as the company to the same extent *pro hac vice* as if the board of directors were operating the railroad. On this ground the Court held that a state tax on the franchise must be paid by the receiver in preference to the rights of the mortgagees.

The Court held that the franchise was the same in both cases, only in one case it was used for the company and by it, by means of its board of directors while in the other the same franchise was used and the road operated under it by an officer of the Court until, by virtue of the legal proceedings, the receiver is discharged and the road returned to its former possessor or it is otherwise disposed of by reorganization or sale.

In the case at bar the mortgage to Roosevelt and Fosdick covered all the property and franchises of the corporation (except the franchise of existence which could not be alienated) which passed to and became vested in the receivers at their appointment, from which time all the corporate power to maintain and operate

the railroad and contract with reference thereto was exercised by the receivers until the property and franchises were sold and conveyed to the purchasers.

The power of the corporation to contract with reference to the railway and its property was as effectually taken away as though a decree of dissolution had passed.

But even commercial paper pure and simple, is subject to the defense of want of power in the maker.

The Floyd Acceptances, 7 Wal., 676.
Marsh v. *Fulton Co.*, 10 Wal., 676, 683.
Merchants' Bank v. *Bergen Co.*, 115 U. S., 384, 393.
Harshman v. *Bates Co.*, 92 U. S., 569.

The fact that the instrument bears a date when the power existed will not aid the holder.

Anthony v. *County of Jasper*, 101 U. S., 693, 698.
Coler v. *Cleburne*, 131 U. S., 162.

The case is analogous to that of an executor or administrator issuing commercial paper executed in form, but not delivered, by the decedent.

Bromage v. *Lloyd*, 1 Exch., 32.
Clark v. *Boyd*, 2 O., 56.
1 Daniels on Neg. Inst., Sec. 64.

To charge the property of the Railway Company for the payment of the bonds in question required an exercise of power which the Court had taken away from the corporation, and was itself then exercising through its receivers. What the corporation acting through its

board of directors could not do, could not, it is manifest, be done by the unauthorized and criminal act of any other agent.

At the time Mr. Lynde purchased the bonds in question, he had actual notice that the railway was in the hands of receivers.

From 1871 down to the time he purchased these bonds he had held some of the 821 bonds validly issued, secured by the Parkhurst mortgage. The interest on these bonds became in default in 1875 after the receivers were appointed, and was not paid until after June 1876, when it was paid to him by the receivers (Rec. p. 39.)

Again in October 1878 and in April 1879, A. Iselin & Co., acting for the receivers but in ignorance of the facts as to the issue of these disputed bonds, paid Mr. Lynde the interest coupons upon them, but in October 1879 the facts had come to light and further payment was refused (Rec. p. 39). But the foreclosure suit then pending continued and was not finally disposed of by a sale of the road until January 1883, more than three years thereafter. When Mr. Lynde discovered that the validity of his bonds as a lien upon the property was disputed it was his duty to have applied to the Court having possession of the property to be examined *pro interesse suo* to the end that the Court administering the fund might determine whether he held a valid lien for the payment of his bonds and order the road sold subject to them.

In *Wiswall* v. *Sampson*, 14 How., 52, this Court, Mr. Justice Nelson delivering the opinion said p. 65 :—

"The proper course to be pursued, says Mr. Daniel, in his valuable treatise on Pleading and Practice in

Chancery, by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo*, and an order for such examination may be obtained by a party interested, as well where the property consists of goods and chattels, or personalty, as where it is real estate.

"And the mode of proceeding is the same in the case of the receiver, 6 Ves., 287; 9 *ibid*, 336; 1 J. & W., 178; 3 Daniel's Pr., 1984. A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgagee, if desirous of enforcing it against the estate after it has been taken into the care and custody of the Court to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the Court for this purpose. The court will direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand, or as to the priority of the lien, etc., and take care that the fund be applied accordingly."

* * * *

"The settled rule, also, appears to be, that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the Court pending the litigation by the appointment of a receiver, or by sequestration, the title is bound from the filing of the bill; and any purchaser, *pendente lite*, even if for a

valuable consideration, comes in at his peril. 3 Swanst. 278, n, 298, n; 2 Daniel's Pr. 1267; 6 Ves. 287; 9 *ibid* 336; 1 J. & W. 178; 3 Daniel's Pr. 1984.

"It has been argued that a sale of the premises on execution and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the Court, and that the sale therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in Court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the Court to see that such application is made. *And in order to effect this, the Court must administer it independently of any rights acquired by third persons, pending the litigation.* Otherwise, the whole fund may have passed out of his hands before the final decree, and the litigation become fruitless.

"It is true, in administering the fund, the Court will take care that the rights of prior liens or encumbrances, shall not be destroyed; and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the Court will be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?"

* * * *

"We agree that the person holding the prior legal lien or encumbrance, must have notice, and an opportunity to come in and claim his prior right to the property or interest in the fund before his legal right can be affected; and the proper way is by summons or notice upon the order or direction of the Court.

This notice can be readily given on the report of the master, of the prior liens or encumbrances resting upon the estate.

But it is not necessary to go this length in the case before us, as it is sufficient to say, that the sale under the judgment, pending the equity suit, and while the Court was in possession of the estate, without the leave of the Court, was illegal and void. We do not doubt but that it would be competent for the Court, in case the judgment creditor, holding the prior lien, had not come in and claimed his interest in the equity suit, to decree a sale, in the final disposition of the fund, subject to his judgment. The purchaser would then be bound to pay it off. But this disposition of the legal prior encumbrance is a very different matter, and comes to a very different result, from that of permitting the enforcement of it, *pendente lite*, without the leave of the Court. The rights of the several claimants to the estate or fund is then settled, and the purchase under the decree can be made with a full knowledge of the condition of the title, or charges to which it may be subject."

Knowing during the three years and more from October, 1879, to January, 1883, that the validity of his lien was disputed, Mr. Lynde took no steps to establish the same, but suffered the proceedings to go on

and the Court to make the order conveying the title to the purchasers as the title stood at the commencement of the suit by Roosevelt and Fosdick, to-wit: encumbered by the mortgage to Parkhurst to the sum of $821,000, and no more. It would seem that this was such a misleading of the Court as should conclude the defendant in error now.

In no department of Judicial administration have Courts been more jealous of any infringement upon their authority or more firm in upholding it than in the administration by Courts of Chancery of property in their custody through receivers. Yet if the position of the State Court is correct, the issue and sale of mortgage bonds fraudulently effected while the Court is in possession may wrest the property out of the hands of the Court, and render its authority vain and its decrees fruitless.

We submit that the interests of commerce do not demand that the Courts shall go thus far.

SECOND.

The rule is elementary that all liens acquired upon the subject matter of the suit *pendente lite*, are cut off by the decree.

On the other hand it is equally clear that the doctrine of *lis pendens* does not apply to *commercial paper.*

The first is the general rule, the latter is an exception to it.

In the case of *Warren Co.* v. *Marcy*, 97, U. S., 96, Mr. Justice BRADLEY says :

"It is a general rule that all persons dealing with property, are bound to take notice of a suit with regard to the title thereto and will, on their peril, purchase the same, from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way."

Justice Bradley further says that the object of this exception "is to protect the commercial community by removing all obstacles to the free circulation of negotiable paper."

But as to real estate, referring to the case of *Murray* v. *Ballon*, 1 Johns, Ch. 566, he says: "That case related to land *with regard to which the rule is uniiversally applied.*"

This doctrine of *lis pendens* as relating to real estate is founded upon its necessity for the authoritative administration of justice. In the leading case of *Murray* v. *Lylburn*, 2 Johns, Ch. 441, quoted from at length by Justice Bradley, Chancellor Kent says: "There is no principle better established nor one founded on more indispensable necessity than that the purchase of the subject matter in controversy, *pendente lite*, does not vary the rights of the parties in that suit who are not to receive any prejudice from the alienation."

In *Metcalf* v. *Pulvertoft*, 2 Ves. & Beam, 199 the Vice Chancellor said :

"The *lis pendens* is presumptive if not actual notice and the purchaser is in the same situation in which the vendor stood ; upon this plain principle, *that the suit is to be decided according to the state of things when*

it was instituted; and the rights, however they may be varied by death, bankruptcy, etc., cannot be affected by the voluntary act of either party.

"This is the principle running through all the cases, both at law and in Equity."

In *Gaskill* v. *Durdin*, 2 Ball & Beatty, Irish Chancery, 167, the Lord Chancellor said:

"The rule of this Court undoubtedly is that any interest acquired in the subject matter of a suit, pending the suit, is so far considered a nullity, that it cannot avail against the plaintiff's title, and if this rule were not attended to there would be no end to any suit, the Justice of this Court would be evaded, and great hardship and inconvenience to the suitor necessarily introduced. *It is extremely difficult to draw any line, and very dangerous to allow of the rule being frittered away by exceptions.*"

We have not been able to find any case in which the exception to the rule of *lis pendens* in favor of commercial paper has been extended to include a mortgage lien to secure such paper acquired during the pendency of the suit.

In the case of a purchase of bonds of an insolvent railway company in the hands of a Court of Chancery for the just administration of its assets, the inconveniences to the commercial world of requiring the purchaser to ascertain that they were issued before the sequestration of the property, would, we respectfully submit, be less harmful than to admit that the Court having seized the property, is unable to administer it for the benefit of those to whom it rightfully belongs.

Respectfully submitted,

Edwd E Dunn

Of Counsel for Plaintiff

No. 552. 105. 16.
Brief of Maxwell for P. C. Co.
Filed Oct. 26, 1896.
Supreme Court U. S.
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 552.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, *Plaintiff in Error,*

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, Executor of the last will and testament of CHARLES R. LYNDE, deceased.

In Error to the Supreme Court of the State of Ohio.

Mr. Maxwell's Brief for the Plaintiff in Error, in Opposition to the Motion to Dismiss or Affirm.

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Supreme Court of the United States,

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vs.

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The object of this brief is not to enter the ground covered by Mr. Burr's brief, but only to add a suggestion to the argument, which he was obliged to prepare and submit during the absence of his colleague from the country, and without an opportunity to confer with him. For a statement of the case the court is therefore referred to Mr. Burr's brief. Indeed, we do not feel called upon, on this motion, to argue the federal question involved, or to do more than to state it, for we are concerned now only in refuting the suggestion that the writ is taken "for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

The Court of Common Pleas of Franklin County, Ohio, from which the case was taken by successive proceedings in error to the Circuit Court of Franklin County, and thence to the Supreme Court of Ohio, found the facts specially. There is therefore no room to dispute the facts.

The plaintiff in error by the third defense of its answer (Rec. 14-20) set up specifically and with great detail its claim of title and of immunity from the lien asserted by the plaintiff, under and by virtue of the proceedings and decrees of the Circuit Courts of the United States for the Southern District of Ohio, the district of Indiana, and the Northern district of Illinois in the foreclosure suits of Roosevelt and Fosdick; and the facts alleged in that defense with reference to those proceedings are all established by the special finding of facts. In other words, it appears that when those suits were commenced in the federal court, and when the court placed the road in the hands of receivers, the property was incumbered by the lien of the Parkhurst mortgage to the amount of $821,000, *and no more.* Finding No. VI. declares specifically that Lynde's bonds remained "*unissued* until the months of November and December, A.D. 1875" (Rec. 31), which was more than nine months after the commencement of the suits of Roosevelt and Fosdick. Finding XIX. declares that "no authority or consent was ever given by the Board of Directors of the said Columbus, Chicago & Indiana Central Railway Company to the issue or sale of the said 179 bonds, or any of them." And finding No. XXXVII. shows how and when, to wit, in November and December, A.D. 1875, the bonds first got out.

The Columbus, Chicago & Indiana Central Railway Company was a party to Roosevelt and Fosdick's suit, and Lynde's claim of a lien upon the road is under that company. But the federal court by a decree operative against that company and all persons claiming under it subsequently to the commence-

ment of the suit, undertook to invest the purchaser with the property as fully and completely as the Columbus, Chicago & Indiana Central Railway Company held it "at the commencement of the suit" and "free, clear and discharged of all rights, estate and interest, claim, lien and equity of redemption in or to the premises and property, rights and franchises so sold and conveyed, and every or any part thereof of each and every of the defendants to said suits, and of all persons claiming or to claim under them, or any of them subsequent to the filing of said bills of foreclosure by said Roosevelt and Fosdick." [Findings XXVIII., XXIX. and XXXII., Rec. 36, 37.]

It must be admitted, therefore, that Lynde's lien, if it was created by the Columbus, Chicago & Indiana Central Railway Company after the commencement of the Roosevelt and Fosdick suits, is barred by the decrees therein as against the purchaser of the road under those decrees. If, for instance, Lynde claimed under a mortgage of the Columbus, Chicago & Indiana Central Railway Company issued and *dated* subsequent to the commencement of Roosevelt and Fosdick's suits, no one could dispute that his title would be barred by the decrees in those cases, and that a denial of such effect to those decrees would be a refusal to give them full faith and credit.

This the Supreme Court of Ohio concede. They say: "The bonds in controversy were not negotiated until 1875, and if their lien dates from that event the two issues of bonds under the subsequent mortgages would be entitled to a prior lien on the property," etc. "But," they add, "the date of the lien of the bonds does not depend upon the date of their original negotiation." [Rec. 64, 65.] In other words, they hold that, although Lynde does claim under the Columbus, Chicago & Indiana Central Railway Company, and although his bonds were not issued until after the commencement of the Roose-

velt and Fosdick suit, so that his lien was not *in fact* created until after the commencement of that suit, he is nevertheless entitled, as against the purchaser under that decree, to escape its plain terms by insisting, as matter of law, that his lien antedates the commencement of the suit.

But where the question is one of power, the want of authority can not be supplied, even in the case of commercial paper, by antedating the act. In Anthony vs. County of Jasper, 101 U. S. 693, 698, Waite, C. J., said:

"Under such circumstances a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. *After the power of an agent of a private person has been revoked, he can not bind his principal by simply dating back what he does.* A retiring partner, after due notice of dissolution, can not charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating under such circumstances partakes of the character of a forgery, *and is always open to inquiry, no matter who relies on it.* The question is one of the authority of him who attempts to bind another. *Every one who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other.* In Bayley vs. Taber (5 Mass. 285), it was held that when a statute provided that promissory notes of a certain kind, made or issued after a certain date, should be utterly void, evidence was admissible on behalf of the makers to prove that the notes were issued after that date, although they bore a previous date."

Coler vs. Cleburne, 131 U. S., 162, was a suit by a bona fide holder of municipal bonds that bore date January 1,

1884, but were not in fact signed until July 3, 1884. The person who signed them was the mayor on January 1, 1884, but had gone out of office in April, 1884. He signed under a resolution of the city council and appended the word "mayor" to his signature. The court, following Anthony vs. County of Jasper, and quoting at length the foregoing passage from the opinion of Chief Justice Waite, held that no one could lawfully sign the bonds but the person who was mayor of the city when they were in fact signed; that the city was not estopped from showing the facts as to the signature, and that the bonds were invalid.

Lynde's claim rests after all upon the sole ground that, although in respect of his bonds no lien had *in fact* been created prior to the commencement of Roosevelt and Fosdick's suit (because the bonds had not then been issued and the maker had been long defunct) they bore a prior date, and he was entitled to assume that they had been issued at their date. As against the supposed maker of the bonds, in a suit to enforce them as mere money obligations, the principles of estoppel might be sufficient to sustain this claim. But the plaintiff in error is an innocent purchaser, under a decree which protects it against all liens put upon the property by the Columbus, Chicago & Indiana Central Railway Company after the commencement of Roosevelt and Fosdick's suit, and if Lynde's lien comes within that description (as it clearly does), he can not, as against the plaintiff in error, invoke any principle of estoppel to evade the plain terms of the decree, especially in view of the fact that he was aware of the cloud upon his lien long prior to the sale, and remained silent, permitting the plaintiff in error to purchase the road upon the assumption that only 821 of the Parkhurst bonds were outstanding.

We respectfully submit that the Supreme Court of Ohio has not given due effect to the decrees of the federal courts

in the suits of Roosevelt and Fosdick, because it has recognized as paramount, in favor of one claiming under a party to those decrees and against the purchaser thereunder, a lien which did not exist at the commencement of those suits, but which was created during their pendency; that this court therefore has jurisdiction to review the judgment of the Supreme Court of Ohio (Embry vs. Palmer, 107 U. S. 3; Dupasseur vs. Rochereau, 21 Wall. 130); and that the proposition that Lynde's lien shall be taken out of the category of those created after the commencement of said suits, is not so clear as to warrant the disposition of the case in the summary manner proposed by opposite counsel, without an opportunity for the usual argument.

It is proper to state that while the present case was pending in the Supreme Court of Ohio, Lynde commenced a suit to establish his lien in the Circuit Court of the United States for the district of Indiana, upon the pretence that the Ohio decree was void so far as it covered the portion of the road situated in Indiana. Of course that was a mere excuse, because the road between Columbus, Ohio, and Indianapolis, Indiana, is a part of the Pennsylvania trunk line, and if it is established in a court of last resort that Lynde has a lien for his 36 bonds they will be paid. But he nevertheless insisted upon vexing the plaintiff in error with a second suit, covering the same questions involved in the present suit and all of them. The case is now pending in the United States Circuit Court of Appeals for the seventh circuit, where it was fully argued upon the merits nearly a year ago, and is awaiting the decision of the court. It may be that that decision will end the controversy.

Respectfully submitted,

LAWRENCE MAXWELL, JR.

CHARLES E. BURR,
Of Counsel.

OCTOBER TERM, 1897.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,

Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, Limited, as CHARLES A. LYNDE, Deceased,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

LAWRENCE MAXWELL, JR.,
CHAS. E. BURR,
Counsel for Plaintiff in Error.

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No. 195.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

THE PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, EXECUTOR OF CHARLES R. LYNDE, DECEASED,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This was a foreclosure suit brought in 1891, in the Common Pleas Court of Franklin County, Ohio, by Lynde, who claimed to be the owner of thirty-six of the second mortgage bonds of The Columbus & Indianapolis Central Railway Company, for one thousand dollars each, dated November 1st, 1864, together with the semi-annual interest coupons, maturing May 1st, 1879, and thereafter down to the commencement of the suit, secured by mortgage on the railway, extending from Columbus, Ohio, to Indianapolis, Indiana, which is now owned by plaintiff in error, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

The petition (printed record, p. 6), made defendants with others, Archibald Parkhurst, trustee of the bonds, The Columbus, Chicago & Indiana Central Railway Company, corporate successors of the alleged maker of the bonds, and the plaintiff in error here, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

Parkhurst and the C., C. & I. C. R'y Co. made default.

The P., C., C. & St. L. R'y Co. answered (p. 12 and 23), denying that the instruments in question were ever made or issued by the alleged maker or either of its corporate successors, and denying that they ever became a lien upon the railway property.

The answer further (printed record, p. 14) set out the proceedings in a former foreclosure suit in the U. S. Circuit Courts for Ohio and Indiana, in. which the railroad was sold and the property thereafter passed by successive conveyances to its present owner, the answering defendant.

The answer further averred that the alleged lien of the plaintiff, if acquired at all, was acquired during the pendency of that foreclosure suit, and while the railroad was in the custody of the Court, by its receivers, and by virtue of the proceedings and sale in that suit such pretended lien was extinguished.

By this answer the plaintiff in error claimed the legal effect of the decree of foreclosure and sale to be the extinguishment of plaintiff's alleged lien on its property.

To this answer a reply was filed in the nature of a general denial, and further alleging that Lynde was a bona fide purchaser for value without notice (p. 20).

The trial Court found in favor of the plaintiff's lien, and decreed a sale of the road for the payment of his bonds. The Court found the facts and its conclusions of law separately and made its finding part of the record (p. 24), and to review the questions of law the case was taken to the State Circuit Court and to the Supreme Court, where the judgment of the trial Court was affirmed in the opinion forming part of the record (page 54).

The State Court thus denied to the decree and proceedings in foreclosure of the Federal Courts the legal effect claimed for them by the plaintiff in error, and made a case where a title or right is claimed under an authority exercised under the United States, and the decision of the State Court was in denial of the title or right so asserted.

A brief history of the case, as disclosed by the record, is as follows:

On the 1st of November, 1864, the Columbus and Indianapolis Central Railway Company, a corporation of Ohio and Indiana, prepared, signed and sealed its one thousand bonds of $1,000.00 each, payable to William D. Thompson, or bearer, on the 1st day of November, A. D. 1904, with coupons annexed for the semi-annual interest, and to secure their payment, executed a second mortgage upon its entire line from Columbus to Indianapolis, to Archibald Parkhurst, trustee (p. 24, 25).

Shortly after the one thousand bonds of the issue in question were signed and sealed, they were all duly certified by the trustee, and prior to January 1, 1867, seven hundred and ninety of them had been exchanged

as provided in the mortgage, and thirty-one had been duly sold. (p. 31.) The remaining one hundred and seventy-nine bonds, including all of the thirty-six bonds in suit, had been sometime prior to 1870, delivered by Parkhurst, the trustee, to B. E. Smith, as President of the company, and remained *unissued* in his possession as President of the maker company and of the companies into which it was afterwards consolidated, until November and December, 1875. (p. 31.)

In September, 1867, the Columbus and Indianapolis Central Railway Company, maker of the bonds, was consolidated with other roads into and became the Columbus and Indiana Central Railway Company (p. 31), and again in February, 1868, this latter company was consolidated with another, and became the Columbus, Chicago and Indiana Central Railway Company, one of the defendants, which we will hereafter designate as the C., C. & I. C. Co. (p. 31, 32.)

On the 20th of February, 1868, the C., C. & I. C. Co. made its mortgage on its line, including the property in question, to Roosevelt & Fosdick, trustees, to secure an issue of $15,000,000.00 of bonds, of which bonds to the amount of more than ten million dollars, were sold. (p. 32.)

About the 15th of December, 1868, the same company made another mortgage to Fowler & Thomas, Trustees, to secure an issue of $5,000,000.00 of bonds. (p. 32). This mortgage recited that the company was indebted for outstanding second mortgage bonds of the Columbus and Indianapolis Central Railway Company in the sum of $821,000.00, and bonds of the $5,000,000.-00 issue were to be set aside, appropriated and used

for the sole purpose of taking up these and certain other specified bonds. (p. 32).

The 821 bonds above mentioned were those secured by the Parkhurst mortgage in question, and which were all of that issue which had been put out. (p. 32).

About the 22nd day of January, 1869, the C., C. & I. C. Ry. Co., leased its entire line to the Pittsburgh, Cincinnati & St. Louis Ry. Co. for 99 years, renewable forever, which latter road took possession and operated it until the sale under foreclosure, mentioned hereafter. (p. 33).

The lease provided that out of the rentals there should be paid the interest on the $15,000,000.00 and the $5,000,000.00 issue, and upon certain income bonds thereafter to be issued not to exceed $2,000,000.00. (p. 33).

It was further provided in the lease that no issue of bonds beyond the three last named should be made by the lessor company without the consent of the boards of directors of the respective parties to the lease. (p. 31). Thereafter no consent was ever given by the board of directors of C., C. & I. C. Co., to the issue or sale of the one-hundred and seventy-nine bonds (which include the plaintiff's thirty-six) or of any of them. (p. 34.)

On the 1st and 2nd days of February, 1875, in the U. S. Circuit Courts for Ohio, Indiana and Illinois, Roosevelt and Fosdick, trustees, commenced action for the foreclosure of their mortgage, making the Railway Company and the Trustees under the Fowler and Thomas mortgage, and others, defendants, but not making Parkhurst a party in respect to his prior mort-

gage, and not seeking to have the road sold free of the Parkhurst mortgage in question. (p. 34). At the same time the plaintiffs moved for the appointment of a receiver or receivers to take possession of the property, and out of the rentals to pay the interest on the bonds issued under their mortgage and the underlying mortgages, etc. (p. 34.)

On the 2nd and 3rd of February, 1875, Roosevelt and Fosdick were themselves appointed receivers, and the Railway Company was ordered by the Courts to forthwith transfer and convey to the receivers all the mortgaged premises which was done on the 25th of May thereafter. (p. 35).

It is important to have the situation at this point definitely fixed in the mind.

The one hundred and seventy-nine bonds, including the thirty-six in suit, had never been issued or delivered to any one, and the intention to use them had been abandoned. The maker had long since gone out of existence by the consolidations of 1867–8.

A mortgage (to Fowler and Thomas) had been put upon the property, subject to the lien of the 821 issued bonds, and no more. In the lease, the lessor company had provided for the payment, by the lessee, of the interest on these 821 bonds, and had bound itself not to issue any more bonds of any sort without the consent of the board of directors of both companies, which was never given. Beyond this the property was now in the custody of the law by proceedings of which all the world was bound to take notice. Under those proceedings the legal title to all the property had been conveyed to the receivers to protect it from any dispo-

sition to the prejudice of the Roosevelt and Fosdick mortgage and the holders of bonds thereunder. The Court had taken it into possession for that express purpose.

The situation above set forth continued until the months of November and December of that year (1875), in which month one B. E. Smith, who had during this time been President of the C., C. & I. C. Co., and its predecessors, borrowed upon his own notes, and for his own purposes, the sum of $48,000 of the Newbolds in Philadelphia, and needing collateral for the same, he resurrected these one hundred and seventy-nine unissued bonds, cut off and suppressed all past due coupons, and falsely pretending to the Newbolds that they were his individual property, pledged a part of them, including the thirty-six in suit, as collateral security for his loan—all without the knowledge or consent of the Railway Company. (pp. 37–38).

Smith renewed his notes from time to time, receiving from the Newbolds the coupons as they come due, and suppressing them, till January 14, 1878, when the Newbold's under their collateral contract, sold the bonds, applying the proceeds to the payment of the loan, and paying the balance to Smith.

No part of the proceeds was ever used for the benefit of the Railway Company. (p. 38.)

The Newbolds themselves bought the bonds, and soon after sent them for sale, to New York, where plaintiff, in May, July and August, 1878, bought them in the usual course of business, without any knowledge of their infirmity. (p. 38.)

Soon after his purchase, August 27, 1878, the plaintiff caused them to be registered in his name by the Secretary of the Union Trust Company, the Registrar, who made no inquiry with regard to their origin. (p. 39.)

Afterward, A. Iselin & Company, acting for the receivers and for the bondholders' committee, paid Mr. Lynde the coupons for May 1, and November 1, 1878, having no knowledge at the time, that these bonds had not been regularly issued by the Railway Company. The money to pay the coupons was furnished by the bondholders' committee, who were afterwards re-imbursed by the Receivers. (p. 39.) Before another coupon was presented for payment the fraud came to light, and when plaintiff, in October, 1879, presented his coupons due May 1, 1879, for payment, he was refused. And this was the first knowledge he had that all was not right with these bonds. (p. 39.)

From 1871 until plaintiff purchased the bonds in question, he held some of the 821 valid bonds of this issue, on all of which the Railway Company defaulted in payment of the interest due May and November, 1875, and it was not paid till after June 30, 1876, when it was paid by the Receivers, all of which facts were known to the plaintiff when he purchased the bonds in question. (p. 39.)

No further change occurred in the situation, and on the 15-23 days of November, 1882, decrees of foreclosure were entered in the Roosevelt and Fosdick suits for the non-payment of the interest on their bonds. (p. 35.)

[To follow page 9 and precede "The Law of the Case."]

ASSIGNMENT OF ERROR.

The Supreme Court of Ohio has not given due effect to the decrees and proceedings in the Circuit Court of the United States for the Southern District of Ohio, for the District of Indiana and for the Northern District of Illinois in the suit of *James A. Roosevelt & Wm. R. Fosdick* v. *Columbus, Chicago & Indiana Central Ry. Co. et al.*, mentioned in the third defense and cross-petition of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company and relied on by said Company as a defense to the present suit, because the Supreme Court of Ohio, contrary to said decrees and proceedings, has recognized as paramount, in favor of one claiming under a party to these decrees and against the purchaser thereunder, a lien which did not exist at the commencement of those suits, but which was created, if at all, during their pendency.

In the decree of foreclosure it was ordered that the property be sold subject to the outstanding sectional bonds prior in lien to the Roosevelt and Fosdick mortgage, and to all other paramount liens thereon, but free from the liens then represented by any party to the cause, and that the purchaser should hold, possess and enjoy said property "*as fully and completely as the said Columbus, Chicago and Indiana Central Railway Company at the commencement of said suit by said Roosevelt and Fosdick held or now holds and enjoys, or is entitled to hold or enjoy the same.*" (p. 36.)

And it was further decreed that by the sale to be made, "the defendants in said suits respectively, and all persons claiming or to claim under them or any of them, *subsequent to the beginning of said suits* by the said Roosevelt and Fosdick *as purchasers, incumbrances or otherwise* howsoever, should be and that they thereby were forever barred and foreclosed of and from all right, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold, and every or any part thereof." (p. 36.)

The property was duly sold, the proceeds being insufficient to pay the bonds issued under the Roosevelt and Fosdick mortgage, and, of course, not reaching the bonds issued under the Fowler and Thomas mortgage. (p. 36.)

Afterwards by successive conveyances and a consolidation, the property duly came into the possession and ownership of the P., C., C. & St. L. Railway Company, plaintiff in error, and remained in its undisputed possession until the commencement of this suit. (p. 36-37.)

THE LAW OF THE CASE.

FIRST.

THE JURISDICTION OF THIS COURT.

A preliminary question was raised by the motion of defendant to dismiss the writ of error for want of jurisdiction in that no federal question is presented in the record.

When this action was instituted plaintiff in error at the first moment possible invoked the decree and sale by the Federal Courts of Ohio and Indiana as a protection to its property from the lien claimed by Lynde and never ceased to urge it upon the Ohio Courts.

(See Third Defense of its Answer, Record, p. 14-20.

The trial Court found the facts to be substantially as set out in the Answer, but denied it the effect claimed.

This made "a case in which a title or right is claimed under an authority exercised under the United States and the decision of the State Court being in denial of the title or right so asserted," jurisdiction is conferred upon this Court by Sec. 709 of the Revised Statutes.

Dupasseur v. *Rochereau*, 21 Wal., 130.

In the case of *Embry* v. *Palmer*, 107 U. S., 3, the Connecticut Court enjoined the collection of a judgment rendered in the Supreme Court of the District of Columbia on the ground that it had been obtained under circumstances amounting to fraud.

The facts were found and made part of the record. This Court reversed the judgment of the Connecticut Court for the reason that the facts found disclosed no ground which upon principles applying to all Courts of

Equity will warrant such Court in enjoining the collection of a judgment recovered at law.

In this Court it was held:

First, that the judgments of the Courts of the United States are upon the same footing so far as concerns the obligation created by them, with domestic judgments of the States (page 10.)

Second, that the rule for determining what effect shall be given to such judgments need not depend upon any principle peculiar to the locality where the judgment was rendered, but upon general principles applicable to the judgments of Courts in general. (p. 11.)

It was further held in that case that inasmuch as upon general principles of equity jurisprudence the judgment of the District of Columbia Court could not be enjoined upon the facts found by the Connecticut Court, the latter Court had not given the judgment "that due effect to which under the Constitution and laws of the United States it is entitled" (p. 19.)

In the case of *Buck* v. *Colbath*, 3 Wal., 334, a United States Marshal was sued in trespass for taking the goods of a third person under a writ of attachment. He pleaded the authority of his writ. The State Court denied his plea and the cause was brought here. This Court held that it was clearly within its jurisdiction to review the action of the State Court and affirmed the judgment below.

See, also, *Crescent Live Stock Co.*, v. *Butchers' Union*, 120 U. S., 141, which seems decisive.
Also, *Huntington* v. *Attrill*, 146 U. S., 657.
Laing v. *Rigney*, 160 U. S., 531.

In the case at bar the trial Court found that at the time the foreclosure suit was instituted in the Federal Court, and that Court took possession of the railroad and caused it to be duly conveyed to its receivers, the bonds in question had not been issued, and that the property was then incumbered in respect to the Parkhurst mortgage to the extent of only $821,000. Upon this state of fact the defendant below claimed that no lien could be acquired upon the property while it was so in the custody of the law, and that the due and legal effect of the decree and sale was to pass the title free from any lien in respect to the plaintiff's bonds.

Upon the authority of the cases we have cited, the denial of this claim by the State Court brings the case as we think clearly within the jurisdiction conferred by the Statute upon this Court.

It is urged by counsel for defendant in error that as Mr Lynde was not a party to the foreclosure suit this is not a case "where the State Court refused to give effect to the judgment of a Court of the United States, rendered upon a point in dispute and with jurisdiction of the case and the parties." But the judgment of the Court is as conclusive upon parties acquiring an interest *pendente lite* as upon the parties to the litigation.

Furthermore, this is not a case for the application alone of the doctrine of constructive notice involved in the rule of *lis pendens*. The Federal Court, through its receiver, was in actual possession of the *res*. In such case it is held that a sale of real estate while in the possession of receivers upon a paper levy made

before the receivership passes no title to the purchaser whatsoever but is absolutely void.

Wiswall v. *Sampson*, 14 How., 52.

Furthermore the petition of opposite counsel begs the very question at issue upon the merits, viz.: whether Mr. Lynde, notwithstanding he was not a party to the foreclosure suit, was, nevertheless, in respect to his claim to a lien upon the real estate, bound by the decree and sale.

It is, therefore, no objection to the jurisdiction of this Court that Mr. Lynde was not a party to the foreclosure suit.

SECOND.

THE MERITS OF THE CASE.

First—The defendant below, The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, having acquired the title to the property, stood in the shoes of the purchaser at the Judicial sale, and was entitled to defeat the claim of the plaintiff against its property —the only matter in which it was interested—by showing either that the bonds were not valid obligations or that the holder, plaintiff below, was not entitled to a lien for their enforcement.

Jones on Corporate Bonds and Mortgages, Sec. 683.

Hackensack Water Co. v. *DeKay*, 36 N. J., Eq. 548, 555.

Second—The bonds in question never had a legal existence as contractual obligations. The alleged maker had become defunct prior to 1875 when the bonds were first hypothecated by Smith.

The bonds purport to have been made by The Columbus & Indianapolis Central Railway Company in 1864, but were not issued by that company. In 1867 this corporation was consolidated with others forming a new corporation, viz., The Columbus & Indiana Central Railway Company. In 1868 this latter corporation consolidated with others forming still a new corporation, viz., The Columbus, Chicago & Indiana Central Railway Company. Upon each of these consolidations the old corporation ceased to exist.

Shields v. *State*, 26 Ohio St., 86, 92.
R. R. v. *Brown*, 26 Ohio St., 223, 239, 240.
Shields v. *Ohio*, 95 U. S., 319, 323.
Ry. Co. v. *Georgia*, 98 U. S., 359, 363-4.
State ex rel. v. *Sherman*, 22 Ohio St., 411, 428.
Compton v. *Ry. Co.*, 45 Ohio St., 592, 615.
Keokuk & West. Ry. Co. v. *Missouri*, 152 U. S., 301.

In *Shields* v. *Ohio*, 95 U. S., 319, 323, a case of corporate consolidation under the Ohio Statute, Mr. Justice SWAYNE says :

"The legislature had provided for the consolidation. In each case, before it took place, the original companies existed and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporations subsisted. All (the old and the new) could not co-exist. It was a

condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution."

True, the old corporation remained alive by a fiction in order to preserve the rights of creditors. *Compton* v. *Ry. Co.*, *supra*. But in respect to the bonds in suit, when these consolidations took effect there was no creditor. They remained undelivered until more than eight years after the last consolidation.

The dissolution of the corporation put an end to Smith's authority to act on its behalf. After its dissolution it could have no agent. There could be no delivery by or on its behalf of bonds which had no inception as obligations to that time. The signatures to them before that time was a mere nullity. It bound nobody and could have been erased or cancelled at any time.

Clark v. *Boyd*, 2 O., 56.

In *Harshman* v. *Bates County*, 92 U. S., 569, a township had been duly authorized to subscribe for the stock of a railroad company, but before the subscription was actually made the railroad company consolidated with another, thereby forming a third. The Supreme Court held that the consolidation terminated the life of the original company, and put an end to the power of the trustees to make the subscription; that the subscription to the consolidated company was illegal, and that the bonds issued in consideration thereof were invalid. Mr. Justice BRADLEY said, p. 575:

"So long as an authority remains unexecuted, the occurrence of any event which creates a revocation in

law will extinguish the power. The extinction of the company in whose favor the subscription was authorized, worked such a revocation. The law authorizing the consolidation of railroad companies does not change the law of attorney and constituent."

See, also, *Long* v. *Thayey*, 150 U. S., 520.

Nor was the corporation estopped by the fact that the bonds put out by Smith bore date as of a time prior to its dissolution. In *Anthony* v. *County of Jasper*, 101 U. S., 693, 698, WAITE, C. J., said:

"Under such circumstances a false date is equivalent to a false signature; and the public, in the absence of any ratification of its own, is no more estopped by the one than it would be by the other. After the power of an agent of a private person has been revoked, he can not bind his principal by simply dating back what he does. A retiring partner, after due notice of dissolution, can not charge his firm for the payment of a negotiable promissory note, even in the hands of an innocent holder, by giving it a date within the period of the existence of the partnership. Antedating under such circumstance partakes of the character of a forgery and is always open to inquiry, no matter who relies on it. The question is one of the authority of him who attempts to bind another: Every one who deals with or through an agent assumes all the risks of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. In *Bayley* v. *Taber*, 5 Mass., 285, it was held that when a statute provided that promissory notes of a certain kind, made or issued after a certain date, should be utterly void,

evidence was admissible on behalf of the makers to prove that the notes were issued after that date, although they bore a previous date."

Coler v. *Cleburne*, 131 U. S. 162, was a suit by a bona fide holder of municipal bonds that bore date January 1st, 1884, but were not in fact signed until July 3, 1884. The person who signed them was the Mayor on January 1, 1884, but had gone out of office in April, 1884. He signed under a resolution of the City Council and appended the word "Mayor" to his signature. The Court, following *Anthony* v. *County of Jasper*, and quoting at length the foregoing passage from the opinion of Chief Justice Waite, held that no one could lawfully sign the bonds but the person who was Mayor of the city when they were in fact signed; that the city was not estopped from showing the facts as to the signature, and that the bonds were invalid.

It might be said of these 36 bonds, as was said of the bonds under consideration in *Anthony* v. *County of Jasper*, p. 700: "They were never in fact issued by the proper authorities. They were in legal effect forged."

The case is analogous to that of an executor or administrator issuing commercial paper executed in form, but not delivered, by the decedent.

Bromage v. *Lloyd*, 1 Exch. 32.
Clark v. *Boyd*, 2 O. 56.
1 Daniels on Neg. Inst., Sec. 64.

Mr. Justice Miller in Floyd's Acceptances, 7 Wall, 676, says: "But, in each case, the person dealing with an agent, knowing that he acts only by virtue of a

delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, can not be used to establish the authority by which it was originally issued."

The bonds, not being liabilities of the old company, could only become binding upon the new, by some affirmative act of the new corporation — such as their authorized issue and sale. But there is no pretense that Smith ever had authority from the new company to issue the bonds.

The new corporation never assumed the bonds as its obligations, or in any manner whatsoever recognized or treated them as such. It never authorized their sale or other disposition. Smith, in pledging the bonds, pretended they were his own property. Their proceeds were not paid or loaned to him as president of the company, but to him in his private and individual capacity. The railroad company never received any part of the proceeds of these bonds, or any benefit from them whatever.

As Smith had no authority in fact to dispose of the bonds for the company, it was not the case of an agent acting for or binding an undisclosed principal. As Smith did not pretend to be acting for the company, but for himself alone and the Newbolds so understood it, they did not deal with him on the faith at any supposed agency, and the company was unaffected by his act. *The Board of Education* v. *Sinton*, 41 Ohio

Stat., 504, 513; *Moores* v. *Citizens' National Bank*, 15 Fed. Rep. 141. Affirmed in 111 U. S. 156.

It was alleged in the petition of Mr. Lynde in the Court below (Record, pp. 6 and 7), that the Columbus and Indianapolis Central R'y Co. made and "issued" (delivered) these bonds. This was denied by the answer of plaintiff in error. (p. 12). The facts found by the Court which are no longer in dispute and to which we have referred, show that they were not delivered by that company, nor by any of its successors, nor were they ever delivered by any one acting or pretending to act on behalf of any of them. The case is simply one in which a person possessed himself by crime of pieces of paper purporting on their face to have been made by a corporation through its agents, but which never had a legal existence before the power of the corporation and its agents to act had ceased. We respectfully submit that the dissenting opinion of Spear, J., of the Ohio Court (Record, p. 65) states the law.

Third—No lien could be acquired upon the railroad property while in the hands of the receivers. When the receivers were appointed in February, 1875, and the property was seized by the Federal Court the railroad was encumbered by a lien under the Parkhurst mortgage to the extent of $821,000, and no more.

It must be apparent to any one reading the decree that the Federal Court undertook to pass the title in respect to liens prior to the Roosevelt and Fosdick mortgage *as they stood at the commencement of that suit.* The Court decreed (p. 36) that the property "should be sold subject to the outstanding sectional

bonds prior in lien to the mortgage to said Roosevelt and Fosdick, and to all other if any paramount liens thereon, but free from the lien of said mortgage, to the said Roosevelt and Fosdick, and that nothing in said decree contained should in any manner effect, prejudice or preclude the holders of said paramount liens or any of them, but that said decree should be without prejudice to the right of them and each of them * * * * that the purchaser of said mortgaged premises should in respect of said premises be invested with and should hold, possess and enjoy the same and all the rights, privileges and franchises appertaining *as fully and completely as the said Columbus, Chicago and Indiana Central Railway Company at the commencement of said suit by said Roosevelt and Fosdick held or now holds and enjoys, or is entitled to hold or enjoy the same,* but free from the liens represented by any party to said cause." It was further "ordered and adjudged that the sale therein decreed to be made and the conveyance after confirmation to be executed and delivered in pursuance of said decree, should be valid and effectual forever, and that thereby the defendants in said suits respectively, *and all persons claiming or to claim under them or any of them subsequent to the beginning of said suits*, by said Roosevelt and Fosdick as purchasers, incumbrancers or otherwise howsoever, should be, and that they thereby were forever barred and foreclosed of and from all right, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold and every or any part thereof." The sale was duly

made and confirmed and a deed delivered in accordance with the terms of the decree (p. 37.)

The outstanding sectional bonds, prior in lien to the Roosevelt and Fosdick mortgage and subject to which the C. C. & I. C. Ry. Co. held the property at the commencement of that suit were the 821 Parkhurst bonds. Had the property at that time, viz.: when that suit was begun, been sold free of all liens, no one would contend that any part of the proceeds would have been distributed to the bonds in suit, since they were then in the hands of the railway company. Under no theory could they become a lien upon the property till they were hypothecated by Smith eight months after the road went into the hands of the Court.

Now, if the Court intended by its decree to pass the title in respect to the Parkhurst mortgage as the latter stood at the commencement of the suit, there only remains the question as to the power of the Court to effectuate its purpose.

Counsel for defendant in error, in their brief in support of the motion to dismiss, cite several cases to the effect that the doctrine of *lis pendens* does not apply to commercial paper. Counsel for the Railway Company have never questioned that proposition. But the case at bar is not one of commercial paper merely, but is a case of commercial paper secured by mortgage on real property. Mr. Lynde did not begin the action as the holder of bonds to enforce their payment againts the maker or its corporate successors, but on the contrary, the object of the suit was solely to reach and subject to their payment the real property, claimed to have been pledged for their security, but which had

been seized by a Court of Chancery before their issue, and afterward duly sold to the predecessor in title of the plaintiff in error.

The plaintiff in error is not concerned with the rights of Mr. Lynde's executors as to the holders of commercial paper, but is defending its title to the real estate so acquired. It might be conceded that, notwithstanding the theft or embezzlement of the bonds by Smith and their unlawful hypothecation, the innocent holder could recover upon them in an action at law. We might also concede upon the principle announced in the case of *Carpenter* v. *Longan*, 16 Wal., 271, that *as against the maker of the bonds* he might have enforced the lien of his mortgage for their security. That case and others to the same effect deal only with contract rights between the parties. But this does not meet the question at bar, viz.: Whether *as against the Court* which took the railroad into its possession for the sole purpose of preserving it, as it then stood, to answer the claim of its suitor when finally established, could the property in any manner without the consent of the Court, be thereafter encumbered by further burdens having priority over the seizure and defeating its object ?

Upon this, by far the most important question, as we understand it, presented by the record, the cases cited by our opponents seem to furnish no light, and in all the discussions of this case, no authority has yet been found supporting the affirmative of the above proposition.

The question is important inasmuch as in this case it touches the right of an innocent purchaser of commer-

cial securities on the one hand, and on the other it concerns the power of a Court of Chancery to protect its suitors. For it must, we think, be conceded by our opponents that if the plaintiff below prevails, a weakness in the power of Courts of equity will be discovered never heretofore admitted.

The purpose and general effect of appointing receivers are of course too well settled to need extended notice. By it the Court takes the subject matter of the litigation out of the control of the parties and into its own hands, and holds it pending the proceedings and until the final disposal of all questions, legal or equitable, involved in the action. The property is a fund in Court to abide the event of the litigation, and if the creditor succeeds in establishing his right to the application of the fund it is the duty of the Court to see that such application is made. To effectuate this the Court will administer it independently of any rights acquired by third persons, pending the litigation.

Wiswall v. *Sampson*, 14 How., 52.

Various devices have been resorted to by the debtor and his creditors to thwart this purpose of the Court and render ineffectual its attempt to administer the property for the benefit of those entitled to it at the time of its seizure, but such devices have uniformly proven fruitless, and the ability of the Court to protect the property for its suitors has in each instance been established. The receiver cannot be disturbed in his possession of the property, no lien by judgment or attachment can be acquired upon it, the receiver cannot be garnisheed, a creditor's bill will not lie against

him, no interest can be acquired in the property by act of the debtor, even by an innocent purchaser.

Wiswall v. *Sampson, supra.*

In the latter case this Court held that while the property was in the hands of a receiver, a sale by the marshal upon execution and a paper levy was absolutely void and conferred no title, even conceding the lien of the execution creditor superior to the claim of the creditor who filed the bill and procured the appointment of the receiver.

The corporation is incapable of annexing any lien to its property or creating any equity against it after it has passed into the hands of a receiver.

Thompson Com. on the Law of Corporations. Secs. 7013, 7060, 7015.

The true principle which governs the Court in the appointment of a receiver is that the fund is in danger.

Orphan Asylum v. *McCartee*, 1 Hopk., 429.

In *Day* v. *Postal Telegraph Co.*, 66 Md., 354, the syllabus on this subject is as follows :

"Where the affairs of an insolvent company have been placed in the hands of a receiver appointed by a Court having jurisdiction of the subject matter, nothing can be done whereby the status of the affairs of that company can be effectually changed or its rights in any way lessened or prejudiced, without the action of the Court."

"A receiver is but the officer or agent of the Court from which he derives his appointment, and his possession is exclusively the possession of the Court; the

property being regarded as in the custody of the law, for the benefit of whoever may be ultimately determined to be entitled to its possession.

"No third party can interfere with the possession of the receiver without leave of the Court, whether such party claims paramount to or under the right which the receivers were appointed to protect."

In *Railway Co.* v. *Lewis*, 81 Texas, 1, it is held that after the receiver is appointed, the property being in *custodia legis*, no lien can follow the property as against the purchaser at the foreclosure sale, which did not exist at the eommencement of the foreclosure suit.

In *Jackson* v. *Laha*, 114 Ill., 287, the Court say, page 295: It would seem an anomaly that a lien adverse to the rights of the receiver could be obtained so as to control the distribution to be made of the fund. "Obtaining a lien implies it may ultimately take the property or funds to which it attaches, and if that could be done in this case it would withdraw the same from the custody of the law or from what is the same thing, the custody of the receiver having the same in possession."

Also *Newport & Covington Bridge Co.* v. *Douglas*, 12 Bush., 673, 708.

Thompson v. *Scott*, 4 Dill., 508.

In the case of *McGowan* v. *Myers*, 66 Iowa, 99, in which a receiver had been appointed of an insolvent debtor's property, the debtor, while the property was in the hands of the receiver, attempted to assign certain interests in it to certain of his creditors. The Court say, p. 104: "We think as the fund was not

the subject of garnishment or seizure in any manner by the creditors, as it was in the hands of the receivers in which Myers" (the debtor) "was a party, and as he made no resistence to the appointment of the receiver and did not appeal from the order of appointment, he had no control over the fund, and no power to direct that it should be paid to one creditor in preference to another. The fund was in the hands of a court of equity, and he had no right to interfere with its equitable distribution."

In *re Merchants' Ins. Co.*, 3 Bliss, p. 162, BLODGETT, J., said, on page 185: "The receiver of a court of chancery is its executive officer, so much so, to all intents and purposes, as a sheriff of a court of law, and the goods or property in his hands are as much in the custody of the law as if levied upon under an execution or attachment."

See, also, *Mays* v. *Rose*, Freem. (Miss.) 703, 718; *Schutte* v. *R. R. Co.*, 3 Woods, 692, 712.

In this case a receiver was appointed of a railroad company in a foreclosure suit and operated the railroad. At the end of the suit a large amount of money remained in the hands of the receivers arising from the operation of the road. A judgment creditor of the company intervened, asking to have his judgment paid out of the earnings of the road. BRADLEY, Cir. J., said, p. 712:

"This claim cannot be allowed. The money realized by the receivers is a part of the fund as it stood when the receivers were appointed and put in possession. It is as much a part of the mortgaged premises as are the rails or the cross-ties of the road. It is the product and

fruits of the property, produced since the court took it in hand, for the use of the liens and trusts by which it is bound. The property was taken possession of by the courts by its receivers, in order to preserve it for the use of those liens and trusts. The fruits arising therefrom whilst thus in custody of the court, do not belong to the Jacksonville, Pensacola & Mobile Railroad Company in any such sense as to be liable to any other claims than those of the parties for whose protection the road was taken into custody, and such charges as appertain to its management and administration. It would be a strange doctrine to contend, that the Jacksonville, Pensacola & Mobile Railroad Company itself could appear before the court and demand the money in the receiver's hands. And if the company cannot do this, neither can any party whose claim is based, as Holland's is, only upon the company's rights."

What Judge BRADLEY calls a "strange doctrine" is precisely what the plaintiff below claims in the case at bar, viz.: that he can enforce a right in the property, created while the property was in the custody of the law, which right shall relate back and antedate both the seizure and the claim under which the seizure was made.

If real estate in the custody of the court by sequestration be sold for valuable consideration to a third party, such title will not prevail against the sequestration.

Bird v. *Littlehales*, 3 Swanst. 299.

In an anonymous case, 6 Ves. Jr. 287, Lord ELDON held that in the case of a receivership a mortgagee hav-

ing a clear right to possession must come in and be examined *pro interesse suo* the same as in case of a sequestration.

In *Coulson* v. *Gardiner*, 3 Swanst. 279, Lord NOTTINGHAM said: "In the next place it must be observed that sequestration is not like any process at common law, nor is it awarded in imitation of any of those processes. 1. For first it is not like a *levari facias* which ceases by the death of the party. 2. It is not like an outlawry when the profits are seized for the contempt but do not necessarily go in satisfaction of the debt. 3. It is not like an execution upon the Statute Westminster 2 or an extent: for though an injunction for the possession be like a *liberate*, yet it covers the whole and reaches copy-holds which no extent does. So that it is a special remedy warranted by the course of the court and stands only upon its own rules."

In *DeWinton* v. *The Mayor of Brecon*, 28 Beav., 200, the Master of the Rolls required a judgment creditor of the defendant to whom the receiver, as garnishee, had paid money by order of a court of law, to repay it and both he and the receiver were adjudged to pay the costs. The Master of the Rolls said, p. 203: "The Court is obliged to keep a strict hand over property in the hands of a receiver, or which by virtue of the order of the Court may come into his hands, in order to preserve entire jurisdiction over the whole matter, and to do that which is just in the cause between the parties."

The authorities cited and many more which might be added show that no device either of the debtor, his creditors or any other claimant has been allowed to

prevail over the power of the Court to protect real property in its custody for the benefit of its suitors and those to whom it is found rightfully to belong.

In no department of Judicial Administration have Courts been more jealous of any infringement upon their authority or more firm in upholding it than in the administration by Courts of Chancery of property in their custody through receivers. Yet if the position of the State Court is correct, the issue and sale of mortgage bonds criminally effected while the Court is in possession may wrest the property out of the hands of the Court, and render its authority vain and its decrees fruitless.

We submit that the interests of commerce do not demand that the Courts shall go thus far.

Again when in a suit for the foreclosure of a railroad mortgage a court of chancery appoints a receiver, there is a seizure of something more than the mere tangible property and credits. The franchises of the corporation become vested in the receiver and thereafter are exercised by him under the orders of the Court. The corporation is not dissolved ; it still has a naked existence, but this primary franchise, viz.: the right to exist as a corporation is all that is left to it.

> Thompson Commentaries on the Law of Corporations 7002.
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> *Central Trust Co.* v. *New York, &c., R. R. Co.*, 110 N. Y., 250.

In the latter case, a foreclosure suit in which a receiver had been appointed, PECKHAM, J., held that in such case the receiver as an officer of the Court exer-

cises the franchises which have been conferred upon the corporation by the State, and that through the Court he acts as the company to the same extent *pro hac vice* as if the board of directors were operating the railroad. On this ground the Court held that a state tax on the franchise must be paid by the receiver in preference to the rights of the mortgagees.

The Court held that the franchise was the same in both cases, only in one case it was used for the company and by it, by means of its board of directors, while in the other the same franchise was used and the road operated under it by an officer of the Court until, by virtue of the legal proceedings, the receiver is discharged and the road returned to its former possessor or it is otherwise disposed of by reorganization or sale.

In the case at bar the mortgage to Roosevelt and Fosdick covered all the property and franchises of the corporation (except the franchise of existence which could not be alienated), which passed to and became vested in the receivers at their appointment, from which time all the corporate power to maintain and operate the railroad and contract with reference thereto was exercised by the receivers until the property and franchise were sold and conveyed to the purchaser.

The power of the corporation to contract with reference to the railway and its property was as effectually taken away as though a decree of dissolution had passed. What the corporation acting through its board of directors could not do, could not, it is manifest, be done by the unauthorized and criminal act of any other person.

Fourth—But there is another reason in this connection why, as we think, the claim of plaintiff below should be denied.

At the time Mr. Lynde purchased the bonds in question in 1878 he had actual notice that the railway was in the hands of receivers.

From 1871 down to the time he purchased these bonds he had held some of the 821 bonds validly issued, secured by the Parkhurst mortgage. The interest on these bonds became in default in 1875 after the receivers were appointed, and was not paid until after June, 1875, when it was paid to him by the receivers. (Rec. p. 39, Par. XLIV.)

Again, in October, 1878, and in April, 1879, A. Iselin & Co., acting for the receivers, but in ignorance of the facts as to the issue of these disputed bonds, paid Mr. Lynde the interest coupons upon them, but in October, 1879, the facts had come to light and further payment was refused (Rec., p. 39, Par. XLIII.) But the foreclosure suit then pending continued and was not finally disposed of by a sale of the road until January, 1883, more than three years thereafter. When Mr. Lynde discovered that the validity of his bonds as a lien upon the property was disputed it was his duty to have applied to the Court having possession of the property to be examined *pro interesse suo* to the end that the Court administering the fund might determine whether he held a valid lien for the payment of his bonds and order the road sold subject to them.

In *Wiswall* v. *Sampson*, 14 How., 52, this Court, Mr. Justice NELSON, delivering the opinion, said (p. 65):

"The proper course to be pursued, says Mr. Daniel, in his valuable treatise on Pleading and Practice in Chancery, by any person who claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or who has a title paramount to the sequestration, is to apply to the Court to direct the plaintiff to exhibit interrogatories before one of the masters, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo*, and an order for such examination may be obtained by a party interested, as well where the property consists of goods and chattels, or personalty, as where it is real estate.

"And the mode of proceeding is the same in the case of the receiver, 6 Ves., 287; *ibid*, 336; 1 J. & W., 178; 3 Daniel's Pr., 1984. A party, therefore, holding a judgment which is a prior lien upon the property, the same as a mortgage, if desirous of enforcing it against the estate after it has been taken into the care and custody of the Court to abide the final determination of the litigation, and pending that litigation, must first obtain leave of the Court for this purpose. The Court will direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand, or as to the priority of the lien, etc., and take care that the fund be applied accordingly."

* * * * *

"The settled rule, also, appears to be, that where the subject-matter of the suit in equity is real estate, and which is taken into the possession of the Court pending the litigation by the appointment of a receiver,

or by sequestration, the title is bound from the filing of the bill; and any purchaser, *pendente lite*, even if for a valuable consideration, comes in at his peril. 3 Swanst., 278, n, 298, n; 2 Daniel's Pr., 1267; 6 Ves., 287; 9 *ibid*, 336; 1 J. & W., 178; 3 Daniel's Pr., 1894.

"It has been argued that a sale of the premises on execution and purchase, occasioned no interference with the possession of the receiver, and hence no contempt of the authority of the Court, and that the sale therefore, in such a case, should be upheld. But, conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in Court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the Court to see that such application is made. *And in order to effect this, the Court must administer it independently of any rights acquired by third persons, pending the litigation.* Otherwise, the whole fund may have passed out of his hands before the final decree, and the litigation become fruitless.

"It is true, in administering the fund, the Court will take care that the rights of prior liens or encumbrances, shall not be destroyed; and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the Court will be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?"

"We agree that the person holding the prior legal lien or encumbrance, must have notice, and an opportunity to come in and claim his prior right to the property or interest in the fund before his legal right can be affected; and the proper way is by summons or notice upon the order or direction of the Court.

"This notice can be readily given on the report of the master, of the prior liens or incumbrances resting upon the estate.

"But it is not necessary to go this length in the case before us, as it is sufficient to say, that the sale under the judgment, pending the equity suit, and while the Court was in possession of the estate, without the leave of the Court, was illegal and void. We do not doubt but that it would be competent for the Court, in case the judgment creditor, holding the prior lien, had not come in and claimed his interest in the equity suit, to decree a sale, in the final disposition of the fund, subject to his judgment. The purchaser would then be bound to pay it off. But this disposition of the legal prior encumbrance is a very different matter, and comes to a very different result, from that of permitting the enforcement of it, *pendente lite*, without the leave of the Court. The right of the several claimants to the estate or fund is then settled, and the purchase under the decree can be made with a full knowledge of the condition of the title, or charges to which it may be subject."

By the refusal of the receivers to pay the interest on the bonds from October, 1879, until the road was sold in January, 1883, Mr. Lynde had notice that the validity of his bonds and of his lien was disputed.

Having actual knowledge of the pendency of the suit he is chargeable with knowledge of all the proceedings therein. He knew that it would be impossible for the Court to determine the amount of the fund due to Roosevelt and Fosdick under their mortgage without first ascertaining whether his bonds were valid or not. But during all those years he took no steps to establish their validity, but suffered the proceedings to go on and the road to be sold subject only to the Parkhurst bonds which were a lien at the commencement of the suit. At any time during that period he had the right, as it was his duty, to apply to the Court to be examined as to his title, and if the same had been adjudged valid the road would have been sold subject to the lien of the bonds in question as well as the rest, and the purchaser would not have been defrauded. As the matter stands, and should his claim be allowed to prevail, Roosevelt and Fosdick will have received $36,000 more than their due out of the fund and plaintiff in error be compelled to pay that much more than the contract price.

Fifth—It may be claimed that the receivers were negligent in not preventing the fraudulent negotiation of these bonds by requiring them to be delivered into their hands or cancelled. It is not improbable that they did make sufficient inquiry and received assurance that the unissued bonds were no longer in existence. Prevarication or even perjury in such matter on the part of Smith, the President of the road, would have been as likely as that he would afterwards embezzle the bonds and their proceeds.

In *Arnold* v. *The Cheque Bank*, 1 C. P. D. 578, the negligence relied on was in the custody of a draft, which a clerk had obtained possession of and stolen. Says Lord COLERIDGE, C. J., delivering the opinion (p 588):

"There could be no negligence in relying on the honesty of their servants in the discharge of their ordinary duty, that of conveying letters to the post; nor can there be any duty to the general public to exercise the same care in transmission of the draft as if any or every servant employed were a notorious theif."

In *Chipman* v. *Tucker*, 38 Wis. 43, the question arose upon the wrongful issue, by a custodian, of a promissory note which subsequently came, bona fide, into the hands of the plaintiff. Defendant had judgment. Upon the question of negligence, the court say:

"It appears that Rowley was an old resident of the place, and one of the leading merchants in business there at the time. He stood wholly indifferent between the company and the makers of these securities; and it would be unreasonable to impute negligence to the defendant because he did not suspect the fidelity or integrity of such a man, and deal with him as though he were already proven to be a knave."

In *Bank of Ireland* v. *Evans' Charities*, 5 H. L. C. 389, the trustees had intrusted the possession of their corporation seal to their secretary, who, during several years, fraudulently affixed it to five separate powers of attorney, authorizing the transfer of stock in the Bank of Ireland, belonging to the corporation, and upon which the bank had made transfers. Said Mr. Baron PARKE, delivering the opinion of the Judges in the House of

Lords, in an action brought against the bank by the trustees, for the conversion of the stock:

"Now we all concur in the opinion that the evidence given which was only of a supposed negligent custody of their corporation seal by the trustees, in leaving it in the hands of Mr. Grace, whereby he was enabled to commit the forgeries, is not sufficient evidence of that species of negligence which alone would warrant a jury in finding that the plaintiffs were disentitled to insist on the transfer being void."

"Is it not a rule that everyone has a right to suppose that a crime will not be committed, and to act on that belief?"

Baxendale v. *Bennett*, 3 Q. B. D., 525, 530, BRAMWELL, L. J.

Board of Education v. *Sinton*, 41 Ohio St., 504.

But it is furthermore clear that the receivers were not the agents of the purchasers and that the negligence of the former could not be imputed to the latter.

Sixth—The rule is elementary that all liens acquired upon the subject matter of the suit *pendente lite*, are cut off by the decree.

On the other hand it is equally clear that the doctrine of *lis pendens* does not apply to *commercial paper.*

The first is the general rule, the latter is an exception to it.

In the case of *Warren Co.* v. *Marcy*, 97 U. S., 96, Mr. Justice BRADLEY says:

"It is a general rule that all persons dealing with property, are bound to take notice of a suit with regard

to the title thereto and will, on their peril, purchase the same, from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way."

Further, quoting from the case of *Kiefer* v. *Ehler*, 18 Pa. St., 388, he gives the reason why the doctrine does not apply to negotiable instruments as follows:

"Unlike all other property *they carry their whole evidence of title on their face*, and the law assures the right of him who obtains them for valuable consideration, by regular indorsement and without notice of the adverse claim or of such suspicious circumstances as should lead to inquiry."

But as to real estate referring to the case of *Murray* v. *Ballon*, 1 Johns. Ch., 566, he says: "That case related to land with regard to which the rule is universally applied."

The doctrine of *lis pendens* as relating to real estate is founded upon its necessity for the authoritative administration of justice. In the leading case of *Murray* v. *Lylburn*, 2 Johns. Ch., 441, quoted from at length by Justice BRADLEY, Chancellor Kent says: "There is no principle better established nor one founded on more indispensable necessity than that the purchase of the subject matter in controversy, *pendente lite*, does not vary the rights of the parties in that suit who are not to receive any prejudice from the alienation."

In *Metcalf* v. *Pulvertoft*, 2 Ves. & Beam, 199, the Vice Chancellor said:

"The *lis pendens* is presumptive if not actual notice and the purchaser is in the same situation in which the vendor stood; upon this plain principle, that the suit is to be decided according to the state of things when *it was instituted;* and the rights, however they may be varied by death, bankruptcy, etc., cannot be affected by the voluntary act of either party.

"This is the principle running through all the cases, both at law and in Equity."

In *Gaskill* v. *Durdin*, 2 Ball & Beatty, Irish Chancery, 167, the Lord Chancellor said:

"The rule of this Court undoubtedly is that any interest acquired in the subject matter of a suit, pending the suit, is so far considered a nullity, that it cannot avail against the plaintiff's title, and if this rule were not attended to there would be no end to any suit, the Justice of this Court would be evaded, and great hardship and inconvenience to the suitor necessarily introduced. *It is extremely difficult to draw any line, and very dangerous to allow of the rule being frittered away by exceptions.*"

We have not been able to find any case in which the exception to the rule of *lis pendens* in favor of commercial paper has been extended to include a mortgage lien to secure such paper acquired during the pendency of the suit.

In the case of a purchase of bonds of an insolvent railway company in the hands of a Court of Chancery for the just administration of its assets, the inconveniences to the commercial world of requiring the purchaser to ascertain that they were issued before the

sequestration of the property, would, we respectfully submit, be less harmful than to admit that the Court having seized the property, is unable to administer it for the benefit of those to whom it rightfully belongs.

Respectfully submitted,

LAWRENCE MAXWELL, JR.,
CHAS. E. BURR,
Counsel for Plaintiff in Error.

No. 332. 1896. 76.

AUG 3 1896

Brief of Kittredge & Wiley

Filed Aug 3, 1896

Supreme Court of the United States.

THE CINCINNATI, HAMILTON, CHICAGO, & ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, Executor of Charles B. Lynde, Deceased,
Defendant in Error.

No. 332.
October Term, 1896.

Brief for Defendant in Error on Motion to Dismiss Writ of Error.

E. W. KITTREDGE,
JOSEPH WILEY,
Counsel for Defendant in Error.

W. H. Anderson & Co., Law Publishers, Cincinnati, Ohio.

SUPREME COURT OF THE UNITED STATES.

THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, Executor of Charles R. Lynde, deceased,
Defendant in Error.

No. 552.
October Term, 1896.

MOTION TO DISMISS WRIT OF ERROR.

Now comes the defendant in error, The Long Island Loan and Trust Company, Executor of Charles R. Lynde, deceased, and moves the Court to dismiss the writ of error in this cause for want of jurisdiction, for that no federal question is presented by the record.

And the defendant further moves the Court to affirm the

judgment of the Supreme Court of Ohio, for that, although the record may show that this Court has jurisdiction, it is manifest that the writ of error was taken for delay only, and that the question on which such jurisdiction depends is frivolous.

E. W. KITTREDGE,
JOSEPH WILBY,
Counsel for Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR UPON MOTION TO DISMISS; AND TO AFFIRM THE JUDGMENT OF THE SUPREME COURT OF OHIO.

This suit was originally brought by Charles R. Lynde in the Court of Common Pleas of Franklin County, Ohio, to foreclose a mortgage dated November 1, 1864, given by The Columbus & Indianapolis Central Railway Company to Archibald Parkhurst, Trustee, to secure, among others, certain negotiable bonds held by Charles R. Lynde. The plaintiff in error herein was made defendant in that suit. By its answer, among other things, it averred that on the 20th day of February, A. D. 1868, said railway company executed and delivered a second mortgage to secure certain bonds to James A. Roosevelt and William R. Fosdick, Trustees; that subsequently, on the 1st day of February, 1875, Roosevelt and Fosdick, Trustees under the second mortgage, filed a bill in the Circuit Court of the United States for the Southern District of Ohio, and in the Circuit Court of the United States for the District of Indiana, to foreclose the second mortgage; and that receivers were appointed in said cause, who took possesson of the property, which was subsequently sold under a decree of foreclosure, and under which sale the plaintiff in error claims title.

Neither Charles R. Lynde, nor anyone representing him,

was a party to this foreclosure suit, the object of which was to foreclose the junior mortgage subject to the prior mortgage to A. Parkhurst, Trustee. The answer further alleged that in 1878, pending the foreclosure suits in the Circuit Courts of the United States, the bonds of Charles R. Lynde were issued and sold by The Columbus & Indianapolis Central Railway Company, the mortgagor, or its successor by consolidation. It further averred that in the decree of foreclosure in the Circuit Court of the United States it was considered and adjudged that the sale ordered to be made should be valid and effectual forever, and that the defendants in the said suits and all persons claiming, or to claim, under them subsequent to the beginning of said foreclosure suits, as encumbrancers or otherwise, should be and thereby were forever barred from all right or interest in or to the premises so sold.

A reply was filed by Charles R. Lynde in the Franklin County Common Pleas Court containing, among other things, a general denial of these allegations of the answer of the plaintiff in error.

At the trial of this cause in the Franklin County Common Pleas Court no bill of exceptions was taken by the present plaintiff in error, but the trial court made a special finding of facts, and, among others, the following:

"XXI. On the first and second days of February, 1875, the said James A. Roosevelt and William R. Fosdick, Trustees under the mortgage to them hereinbefore described, commenced their actions for the foreclosure of said mortgage, and for other purposes, but not affecting the Park-

hurst mortgage aforesaid, or the bonds thereby secured, concurrently in the Circuit Courts of the United States for the Southern District of Ohio, the District of Indiana, and the Northern District of Illinois. In said actions one William L. Scott appeared and filed his cross bill in October, 1881, claiming to be the owner of certain bonds secured by the mortgage to said Roosevelt and Fosdick, and praying, among other things, for the foreclosure of the same mortgage, but asking no relief against said Parkhurst mortgage or the bonds secured thereby."

There was no allegation in any of the pleadings in the cases in the United States Circuit Courts in respect to the mortgage of The Columbus & Indianapolis Central Railway Company to Archibald Parkhurst dated November 1, 1864, nor in respect to the bonds therein described; and no issue was joined in respect to the same; nor was said Archibald Parkhurst, as Trustee or otherwise, called upon to set up his interest in said railroad property.

Messrs. Roosevelt and Fosdick were appointed receivers of the said railroad in said cases to "receive the rents from the lessees of the railroad," but they were directed not to disturb the possession by the lessee of the mortgaged premises.

In the decree of foreclosure in these cases it was ordered and adjudged that the property should be sold subject to the outstanding sectional bonds prior in lien to the mortgage of said Roosevelt and Fosdick, and to all other, if any, paramount liens thereon; but free from the lien of the said mortgage to Roosevelt and Fosdick; and that nothing in said decree should in any manner affect, preju-

dice, or preclude the holders of said paramount liens, or any of them, but that said decree should be without prejudice to the right of them and each of them.

The Common Pleas Court of Franklin County, Ohio, rendered a judgment in favor of Charles R. Lynde, which judgment was affirmed by the Circuit Court of Franklin County; which latter judgment was affirmed by the Supreme Court of Ohio.

If we understand the federal question supposed to be raised upon this record, it is that the "state court refused to give effect to the judgment of a court of the United States, rendered upon a point in dispute, and with jurisdiction of the case and of the parties."

It is obvious that, as neither Charles R. Lynde nor any person representing him was a party to these foreclosure suits in the Circuit Courts of the United States when Mr. Lynde acquired his bonds, and as no issue was made in said cases in respect to the Parkhurst mortgage or the bonds secured thereby, there is nothing in the judgment rendered in those cases that can affect the rights of these bondholders.

The courts of Ohio found that the bonds in question were in the hands of Charles R. Lynde as a bona fide holder for value before due, and became a valid lien upon the property from the time in 1864 when they were certified to by Mr. Parkhurst as Trustee, and the mortgage was recorded by the mortgagor.

They also found that the bonds were sold by the presi-

dent of the mortgagor company, in whose custody they had been placed at the time of their execution. This sale by the president was after the appointment of a receiver in the suit to foreclose the Roosevelt and Fosdick mortgage. The claim was made that the title of Charles R. Lynde was affected by the pendency of this foreclosure litigation.

But the state court decided that not only did the decree of sale in these foreclosure suits expressly reserve the right of the bondholders under the Parkhurst mortgage, but they also decided that the doctrine of *lis pendens* has no application to commercial paper. They held that the lien of Charles R. Lynde as a bona fide purchaser was not affected by these foreclosure suits, to which he was not a party, and of which he had neither actual nor constructive notice.

These findings and conclusions present no federal question; and they are in accord with the settled doctrine of the Supreme Court of the United States.

County of Warren vs. Massie, 97 U. S. 96;
County of Cass vs. Gillette, 100 U. S. 585;
Carroll County vs. Smith, 111 U. S. 556;
Claflin vs. S. C. R. R. Co., 8 Fed. Rep. 118;
Farmers L. & T. Co. vs. T. & S. H. R. Co., 54 Fed. Rep. 759.

No record of the foreclosure cases in the federal courts, or of the issues joined in those cases, is contained in the record of the case in the state court, but it is expressly shown by the stipulations of the parties and the findings of the

court that no relief was sought in those cases against the Parkhurst mortgage, or the holders of the bonds secured thereby, and that no issue was joined in respect to that mortgage.

We respectfully submit that there is nothing in the record to show that any title or right, under any judgment of any court of the United States, with jurisdiction of the case and of the parties, rendered upon a point in dispute, has been denied by the decisions of the state courts. There is, therefore, no federal question presented by this record.

As the decision of the case, by the Supreme Court of Ohio, has not yet been reported we print a copy of it from advance sheets as an appendix to this brief. It will clearly appear from this opinion that no federal question was presented to, or decided by, the Supreme Court of Ohio in the determination of this case.

Respectfully submitted,

E. W. KITTREDGE,
JOSEPH WILBY,
Counsel for Defendant in Error.

(THE SUPREME COURT OF OHIO.)

THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY CO.

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, EXECUTOR OF CHARLES R. LYNDE, ET AL.

1. The bonds of an Ohio railroad corporation payable in New York City to bearer are negotiable without endorsement, although sealed with the corporate seal, notwithstanding that they were made in 1864, while Section 1 of the Act of 1820 (S. & C. 862) in relation to negotiable paper was in force.

2. Where such bonds are secured by a mortgage on the roadway and other property of the maker, executed to a trustee for that purpose, and are issued at different times, the lien of all the bonds outstanding, in the hands of bona fide holders for value, are equal in priority, the lien of each bond dating from the record of the mortgage that secured it and not from the time it was issued.

3. Where such bonds, complete in form, and negotiable by delivery, are placed in the custody of the president of the company he thereby becomes clothed with an apparent authority of disposition. In such case, if the custodian, without the consent or knowledge of the company, wrongfully and for his own benefit negotiates them, and in due course of business before due, to one who pays therefor their fair value, without notice of any restriction on such apparent power of disposition, the transaction confers upon such purchaser a valid title to the bonds so purchased, and

entitles him to a lien against the mortgaged property for their payment.

4. Where such mortgage contains a condition providing that in case the company defaults for more than six months in the payment of interest on such bonds, they shall immediately become due and payable, and such default is made, Query: Whether such default alone, without any steps being taken by any holder to enforce the provision, is such a dishonor of the bonds as to destroy their negotiability. But whether this default would have such effect or not, if the interest is afterwards paid in full the negotiability of the bonds is thereby restored.

5. The doctrine of *lis pendens* does not apply to negotiable paper transferred before due in due course of business for value.

Error to the Circuit Court of Franklin County.

This action was brought in the Court of Common Pleas of Franklin County by defendant in error, Charles R. Lynde, against The Pittsburg, Cincinnati, Chicago & St. Louis Railway Co., plaintiff in error, and others, to recover upon thirty-six bonds of one thousand dollars each, made in 1864, by The Columbus & Indianapolis Central Railway Company, which bonds were a part of a series of one thousand bonds secured by a mortgage on the roadway and other property of the company by which they were made. The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company by answer denied the validity of the bonds in controversy, setting forth a judicial sale and a series of consolidations of different railroad companies by which the mortgaged property became vested in it, and praying that the title to this property be quieted against the lien claimed on behalf of these bonds. Upon the trial in the Court of Common Pleas of the issues joined between the plaintiff there and the answering defendant, The Pittsburg, Cincinnati, Chicago & St. Louis Railway

Company, the plaintiff prevailed, the court holding that the bonds sued upon were valid obligations of the railroad company that made them, and a lien upon the mortgaged property in the hands of the answering defendant. The defendant, The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, now plaintiff in error, with a view of excepting to the decision, requested the Court of Common Pleas to state its findings of fact separate from its conclusions of law. This was done. The cause was then taken to the Circuit Court, where the judgment of the Common Pleas was affirmed, whereupon The Pittsburg, Cincinnati, Chicago & St. Louis Railway Company brought the cause to this court for review. A statement of facts necessary to the decision of the case will be found in the opinion of the court.

Watson, Burr & Livesay, and Lawrence Maxwell, Jr., for plaintiff in error.

Kittredge, Wilby & Simmons for defendant in error.

BRADBURY, J.

The contention between the parties assumes a twofold form: One respects the title that the defendant in error acquired to the bonds in controversy. If he acquired no title to them as against the obligor, nor against either of the consolidated companies into which the obligor became merged by the consolidation that afterwards occurred, he must fail in the action. If his title is valid against the obligor, or against either of the consolidated companies formed before the bonds were negotiated, then the second contention arises, which relates to the lien claimed for these bonds, on the mortgaged property, this property having passed into the ownership of plaintiff in error.

The evidence discloses no marked dispute over the main facts of the case, and the trial court could have encountered no serious difficulty in ascertaining them. Doubtless, as the defendant in error contends, the evidence submitted to the trial court would have authorized the finding of

some additional facts that bear favorably for him, upon a general view of the equities of the case, but their character and importance were not controlling, and in the view we have adopted they become immaterial.

The finding of fact made by the Court of Common Pleas was both comprehensive and minute, embracing many circumstances and details formal in their character, though doubtless most of them were indispensable to a determination of the contention between the parties. It covers thirty pages of the printed record. The repetition of only a small part of this statement is required as a basis for our conclusions. On November 1, 1864, The Columbus & Indianapolis Central Railway Company, a corporation under the laws of the States of Indiana and Ohio, authorized the execution of one thousand of its bonds, each of the denomination of one thousand dollars, payable November 1, 1904, bearing seven percent interest, payable semiannually, these payments of interest being evidenced by coupons attached to the bonds severally. These bonds were duly executed, being signed by the president, attested by the secretary of the company, and the corporate seal attached. They were made payable to William D. Thompson, or bearer, in New York City. Each bond contained this provision: "This bond shall be transferable by delivery, or it may be registered as to its ownership on a registry to be kept by the company, and being so registered it shall then be transferable only on the books of the company until released from such registry on said books by its owner. This bond shall not become obligatory until it shall have been authenticated by a certificate annexed to it duly signed by the trustee." The bonds were secured by a mortgage conveying the roadway and other property of the makers to A. Parkhurst in trust for that purpose. It is a certificate of this trustee that is declared necessary to render them obligatory.

This authentication was duly made on each bond by the following certificate:

"I hereby certify that this bond is one of the series of bonds described in and secured by the deed of trust or mortgage above mentioned. A. Parkhurst, Trustee."

The statement that the bonds should not become obligatory until thus authenticated is equivalent to a declaration that when duly executed by the company, and so authenticated, their obligatory character shall become complete. They then became perfect in form, and by their express terms transmissible by mere delivery.

Eight hundred and twenty-one of these bonds were duly negotiated on behalf of the company. The remaining one hundred and seventy-nine, of which the thirty-six in controversy were part, were, as early as 1870, placed in the custody of Benjamin E. Smith, the president of the company, and remained in his custody until the year 1875, when, in November or December of that year, he borrowed for his own purposes certain sums of money, amounting to $48,000, from W. H. Newbold, Son & Co., a firm of brokers in the city of Philadelphia, for which he executed and delivered to them his individual notes, and at the same time, falsely pretending to the said W. H. Newbold, Son & Co. that he was individually the owner of said bonds, delivered certain of said bonds, including the thirty-six bonds described in the plaintiff's petition, to the said W. H. Newbold, Son & Co. as collateral security for the payment of his said notes.

Thereafter the said Smith renewed his notes with the same collateral from time to time, until about the 14th day of January, 1878, when the bonds so held as collateral security were sold by the said W. H. Newbold, Son & Co., and the proceeds applied to the payment of said notes, and the balance paid over to the said Smith, or for his use, and no part of the same was used for the benefit of said railway company.

At the time the said bonds were so pledged to the said W. H. Newbold, Son & Co., all the past due coupons had been cut off, and while they were so held as collateral se-

curity the subsequent coupons as they came due were cut off from the said bonds and delivered to the said Smith, but the same were never presented for payment.

At the sale of said bonds the said W. H. Newbold, Son & Co. themselves became the purchasers of all said thirty-six (36) bonds, paying the full market price at the time of the purchase, and buying them in good faith, without knowledge of any defect in them or any of them; and thereafter they sent the said thirty-six bonds to New York for sale.

Plaintiff, in the months of May, July, and August, 1878, purchased said thirty-six bonds in good faith in the usual course of business, for valuable consideration, being about ninety cents on the dollar, which was at the time the usual market price for the bonds secured by said second mortgage, and without knowledge or notice of any of the unauthorized or fraudulent acts of said Smith concerning said bonds, and without any knowledge or notice that said bonds had not been sold by the said Columbus & Indianapolis Railway Company, and thereby became and is now the bona fide holder and owner of said thirty-six bonds and the coupons thereto belonging, described in the petition; and that before said thirty-six bonds had been purchased by plaintiff, the Railway Company had not made default in the payment of the interest on said thirty-six bonds, and no holder of said bonds prior to said plaintiff had elected that the principal sum thereof should become due.

At the time when the plaintiff purchased said thirty-six bonds the coupons belonging thereto due May 1, 1878, were still attached to the said bonds, and were unpaid.

On or about the 27th day of August, 1878, the plaintiff presented the said thirty-six bonds for registration to the secretary of the Union Trust Company, New York, which company had been theretofore designated by said Columbus, Chicago & Indiana Central Railway Company as its registering agent for said bonds in the city of New York, to put the bonds in the name of the party registering them and taking them out of the register and making them to

bearer; and the secretary then caused the same to be registered in the name of Charles R. Lynde. At the time of said registration no inquiry was made by the said secretary as to whether or not the said bonds had been regularly issued by the said Columbus & Indianapolis Central Railway Company.

From the year 1871 until after the purchase by the plaintiff of the thirty-six bonds described in the petition the plaintiff held and owned other bonds secured by the said mortgage of the Columbus & Indianapolis Central Railway Company to Archibald Parkhurst, trustee, described in the petition being some of the 821 bonds hereinbefore described. The said Columbus, Chicago & Indiana Central Railway Company made default in the payment of the interest coupons upon said 821 bonds due on the first day of May, 1875, and on the first day of November, 1875, and the said interest coupons were not paid until after June 30, 1876, when the same were paid by or on behalf of the said receivers hereinbefore mentioned, all which facts were known to the plaintiff at the time he purchased the said thirty-six bonds described in the petition. No authority or consent was ever given by the board of directors of the said Columbus, Chicago & Indiana Central Railway Company to the issue or the sale of the said 179 bonds or any of them.

Before this negotiation was had, the obligor, The Columbus & Indianapolis Central Railway Company, had, by two separate schemes of consolidation, become merged into The Columbus, Chicago & Indiana Central Railway Company, which latter corporation, by force of the consolidations, had become the owner of the property of the obligor, which was pledged to pay these bonds. Said Benjamin E. Smith, being continuously the president of the successive companies, and as such president had the bonds in his custody. This negotiation and pledging of said bonds was had without the knowledge, consent, or authority of said Columbus, Chicago & Indiana Central Railway Company, or of its constituent companies.

The title of defendant in error to the bonds in controversy rests upon the facts thus recited. Plaintiff in error contends, among other things, that the facts thus stated show that neither the maker of these bonds nor the consolidated companies into which it became merged consented to this sale or delivery of the bonds, and as an owner can not be deprived of his property without his consent no title passed.

It is true that these bonds were negotiated to Newbold and son without the knowledge or consent of the company that made them, or the knowledge or consent of any of the companies into which it became merged by the several consolidations mentioned. But such consent and knowledge is not indispensable to pass the title to negotiable instruments. Where this class of paper, complete in form and transmissible by delivery, is placed by the maker or owner in the custody of one who is thereby clothed with an apparent power of disposition, and the custodian avails himself of the opportunity thus afforded him to negotiate it to an innocent party, the title of the holder is not to be tested by principles applicable to stolen securities, but by principles properly applicable to the transaction as it actually occurred. That the title to negotiable securities may pass by virtue of such transaction as the finding of fact shows occurred in respect to the negotiation of the bonds in question is, we think, clear upon principle and sustained by authority. Railway Co. vs. Sprague, 103 U. S. 756; Fearing vs. Clark, 15 Gray, 74.

Independently of the rule of law designed to protect and give currency to negotiable paper, those principles of natural justice universally applicable to the affairs of mankind, when applied to this transaction, would seem to demand the protection of the defendant in error as against the maker of the bonds, and all who stand in its shoes. He was wholly free from fault in connection with the transaction. Each bond contained a declaration of its transmissibility from hand to hand by mere delivery. He

found them for sale before they were due, in the market where such securities are usually offered for sale, and bought them at their fair market value, without notice of any infirmity in their title. Soon thereafter he took them to the Union Trust Company, in New York City, the agents of the maker, specially appointed to register its bonds, and caused them to be registered in his name on its books. What more could even the highest degree of prudence or diligence demand of him?

On the other hand, the maker of the bonds, a railway company, capable of acting through agents only, placed these bonds in the custody of its president, an agent clothed with high, though possibly not clearly-defined, powers. The bonds were perfect obligations, bearing on their face a certificate of authentication by the trustee, and containing an express declaration of their transmissibility from hand to hand by mere delivery. He was, up to and long after the time these bonds were negotiated, continued as president of the different consolidated companies as they were successively formed. The companies thus held him out to the world as one who could be trusted to transact matters of importance. Under these circumstances what can be found tending to excite a doubt in the most cautious mind respecting his power to dispose of bonds so entrusted to him?

If the maker of these bonds and those who must abide by their title can shift the responsibility and consequent loss resulting from this transaction from themselves to the holder of the bonds it must be by the application of some stern rule of law founded upon considerations of public policy.

The contention against the negotiability of these bonds rests upon a statute passed in 1820 (S. & C. 862), and in force when the bonds in question were made and negotiated.

"Section 1. Be it enacted by the general assembly of the State of Ohio, that all bonds, promissory notes, bills

of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by endorsement thereon, so as absolutely to transfer and vest the property thereof in each and every indorsee successively; but nothing in this section shall be consrtued to make negotiable any such bond, note, or bill of exchange drawn payable to any person or persons alone, and not drawn to order bearer or assigns."

In 1846 this court, notwithstanding the terms of the statute, held, in Avery vs. Latimer, et al., 14 Ohio St. 542, that a promissory note payable to bearer was negotiable by mere delivery, but that a sealed instrument in the same form was not a promissory note, and is only negotiable by endorsement. Cushman vs. Welsh, 19 Ohio St. 536, and Osborn vs. Kistler, 35 Ohio St. 99, assert the same rule respecting the necessity of an endorsement to transfer title to a sealed instrument in the form of a promissory note payable to bearer.

In Avery vs. Latimer, et al., supra, the court was of opinion that the language of the statute just quoted (S. & C. 862) was such that if it had been recently enacted its terms would have compelled them to hold that an endorsement of a promissory note was necessary to its negotiability in all instances, whether sealed or not. But in deference to a long-continued practice to the contrary the court held the endorsement to be unnecessary to the transfer of a promissory note (not under seal) payable to bearer. We think the same considerations, based on a similar long-continued practice in regard to railroad bonds, together with the express declaration of transmissibility appearing on the face of the bonds in controversy and the manifest necessity of the quality of negotiability by mere delivery to their availability to accomplish the object expected of them, would require us to hold them to be negotiable by mere delivery, even if of the opinion that they were sealed instruments according to the strict construction of that

statute. But whatever the court might hold upon the question just suggested may be regarded as speculative, for we are of the opinion that the attachment of the corporate seal did not stamp upon them the character of sealed instruments within the meaning placed upon that term by the decisions of this court before cited. Avery vs. Latimer, et al., 14 O. 542; Cushman vs. Welsh, 19 Ohio St. 536; and Osborn vs. Kistler, 35 Ohio St. 99.

In those cases the instruments were made by natural persons, who signed their names and also affixed or adopted a private seal, thereby manifesting a purpose to place them in the class of sealed instruments, and the court dealt with them according to the character thus expressly stamped on them by the parties.

In the case of railroad or other corporate securities, however, the attaching of a corporate seal bears a strong analogy to the signature of a natural person, and is its substantial equivalent. In view of the vast sums of money represented by this class of securities and of the existence of a practice of passing them from hand to hand by delivery so universal and long continued as to be within the common knowledge of everyone, they should not be shorn of this valuable attribute on this account unless the words of the statute and the former decisions of the court imperatively require it, which we do not think they do. Besides, the bonds in question are payable in New York. The contract was to be performed there. All parties must be deemed to have had the law of the place of the performance of the contract in view, and we are cited to no statute or decision of the courts of that state that take from these bonds the quality expressly given them in direct terms of transmissibility by delivery. We therefore hold the bonds to have been negotiable by delivery.

At the time Lynde purchased the bonds in controversy, and for some years before, he owned some of the 821 conceded to have been genuine. In 1875, more than two years before Lynde purchased those in controversy, default

was made in the payment of interest on those that were genuine, and as Lynde owned some of them he was chargeable with notice of such default. This default, it is claimed, rendered them overdue and therefore dishonored.

It is true that the mortgage by which the bonds were secured contained the following provision: "And it is further agreed by the party of the first part that in case the said company for the term of six months shall make default of the payment of its interest warrants, or any of them, then the whole principal money contained in said bonds shall become due and payable."

The default consisted in the nonpayment of the interest due for May and November, 1875, and continued until June 30, 1876, a period of more than six months. The entire interest, however, was paid on the day last named. In the meantime no steps were taken to enforce any rights growing out of this default.

This payment of the overdue interest was made more than two years before the purchase by defendant in error of the bonds in controversy. Even if the holders of the bonds were chargeable with notice of this provision in the mortgage (no such provision appearing on the bonds), and that provision was self-operating, so that a mere default of six months in the payment of an installment of interest dishonored the bonds by making them overdue, this taint should be regarded as removed by a subsequent payment of interest to the acceptance of all the bondholders, and therefore the quality of negotiability should be deemed to be restored.

We are therefore of opinion that the title of defendant in error to the bonds in controversy is valid.

We now come to the question respecting the lien claimed for these bonds upon the property mortgaged to secure them, which property has passed into the ownership of plaintiff in error.

The case of Bailey vs. Smith, 14 Ohio St. 396, is cited by plaintiff in error as decisively determining the question

of the lien of the bonds in controversy upon the mortgaged property adversely to the claim of a lien. We are not disposed to depart from the doctrine established by that celebrated case; it has become a rule of property in this state that should not be lightly disturbed, and, besides, is founded upon considerations that appeal strongly to feelings of natural justice. That case does not deny the right of a bona fide holder of negotiable paper to enforce it against the maker, though the latter may have been induced by fraud to make or part with it, but it does deny the right of such holder to enforce a mortgage given to secure such paper if the mortgage also was procured by fraud. In that case the note and mortgage were both procured from the maker by fraud, and that circumstance is the predicate of the decision. What the decision might have been if fraud had intervened only in respect to one of the two instruments present in that case is a subject about which we may speculate, and upon which different minds might reach opposite conclusions. The reasoning of the learned judge, as I gather it from his opinion, leads me to the belief that he would have reached the same conclusion had the mortgage alone been tainted with fraud, but possibly to a different one if the mortgage had been free from fraud, though the note was tainted.

However this may be, there are considerations growing out of the nature of the transaction in that case that distinguish it from the one under consideration. That transaction occurred between private persons, and consisted of a single note, secured by a mortgage on a tract of land. The learned judge having in view these circumstances said: "Now, mortgages are not necessities of commerce. They have none of the attributes of money; they do not pass in currency in the ordinary course of business; they are securities or documents for debts due for the purpose of investments, and unavoidably requiring from those who would take them with prudence and safety inquiry into the value, condition, and title of the property upon which

they rest; nor have we the least apprehension that commerce will be impeded by requiring the further inquiry of the mortgagor, whether he pretends to any defense before a court will foreclose his right to defend against those which have been obtained by force or fraud. * * * A long experience has demonstrated that they are not necessary instruments of active trade and business, and we but follow in the footsteps of the oldest and wisest judges when we say that the harsh rule which excludes equities, and often does injustice for the benefit of commerce, should not be applied to them. * * * If they are assigned either expressly or by legal implication, the assignee takes only the interest the assignor had in the instrument * * *."

This language and course of reasoning, perfectly appropriate to the transaction then under consideration, would be strangely out of accord in discussing the principles that should determine the rights of bona fide holders of railroad bonds. These latter are instruments of trade and commerce in the broad sense of those terms; they are designed for sale in the money markets of both Europe and America; they are made payable to bearer for the express purpose of facilitating their negotiability. In the case of the bonds under consideration they declare on their face the fact of their transmissibility by mere delivery. The mortgage is made to a trustee for the benefit of every bond into whomsoever's hand it may chance to pass, and its sole purpose is to give value to these bonds in the money marts of the world. Prospective purchasers of these bonds do not and can not make such specific inquiry and examination into the condition of the mortgaged property as may be made by a purchaser of a note and mortgage under the circumstances supposed by the learned judge.

It might be entirely practicable, and the dictates of prudence might require of one about to purchase a note and mortgage of the mortgagee that he inquire of the maker the circumstances under which they originated, but to require this inquiry of one who, in a distant city, is

about to purchase a railroad bond offered for sale in the market would be to defeat the purpose for which they were designed. Therefore we do not think the case of Baily vs. Smith, supra, applicable to the case under consideration.

The roadway and other property pledged by the mortgage to secure the payment of these bonds subsequent to the making of the mortgage passed by two successive railway consolidations, one made in 1867, the other in 1868, into the ownership of a corporation known as The Columbus, Chicago & Indiana Central Railway Company. This latter railway company, by the consolidations mentioned, thus became the owner of the property pledged for the payment of the bonds in controversy, as well as of the property of its other constituent companies. The new company executed two mortgages on its entire property, one in February, 1868, the other in December of the same year. Under the first of the two, bonds to the amount of about ten million dollars were issued, and under the other, bonds aggregating less than five million dollars were issued. These two mortgages were duly recorded, and no question is made respecting their validity. In 1869 the roadway and property of this consolidated company was leased for a term of ninety-nine years, renewable forever to The Pittsburg, Cincinnati & St. Louis Railway Company, and on or about February 1, 1869, the latter company went into possession, and continued to occupy and operate the road until after its sale in 1883, upon the foreclosure of the two last-mentioned mortgages.

In 1875 actions were begun in the Circuit Court of the United States for the Southern District of Ohio, in the Circuit Court of the United States for the District of Indiana and for the Northern District of Illinois, by the trustees in the first of the two last-named mortgages to foreclose the same, to which action The Columbus, Chicago & Indiana Central Railway Company (the consolidated company that made the two last mortgages), the trustee in the mortgage last made, and the trustee in the mortgage made

to secure the bonds in controversy were each made parties. Receivers were appointed by the court, to whom the consolidated company (The C. C. & I. Central Railway Company), on May 25, 1875, conveyed the entire property covered by the mortgages, pursuant to an order of court made in the actions, but subject to the right of the lessee of the road to continue in its possession, control, and management. This deed was not recorded, and the defendant in error, Lynde, had no actual knowledge of its existence until 1891. In November, 1882, decrees were rendered in these actions for the sale of the mortgaged property.

By the terms of this decree the entire interest that The Columbus, Chicago & Indiana Central Railway Company, the mortgagor in the two last mortgages, had in the mortgaged property, and all the rights of the mortgagees in the two last mortgages, were ordered to be sold, free from all liens acquired during the litigation, but the decree expressly provided that it should not affect or prejudice prior liens, one of which was the mortgage made in 1864 to Parkhurst to secure the one thousand bonds, of which the thirty-six involved in this action are part.

In February, 1883, the property was sold under this decree to William S. Scott and his associates, who shortly thereafter conveyed it to The Chicago, St. Louis & Pittsburg Railroad Company. By a consolidation of this company with The Pittsburg, Cincinnati & St. Louis Railway Company the lessees of the road, the plaintiff in error, was formed and thereby became vested with the property embraced in the mortgage made in 1864 to secure the one thousand bonds, which, as we have seen, included those in controversy.

If the equities of the defendant in error growing out of the circumstances before noticed, under which the bonds in controversy were negotiated, were so clearly and materially stronger than those favorable to the company that made, and the company that offered them to be thus negotiated as to authorize a decree declaring them to have a

lien upon the property originally pledged for their payment, what circumstance appears in the proceedings by which this property came into the ownership of plaintiff in error that should operate to destroy this lien? The defendant in error is not chargeable with any actual neglect or omission of diligence in connection with the matter, nor of any actual notice of the proceedings.

The several transfers of the property caused by the different railroad consolidations would not affect the lien, for the statutes authorizing them expressly provide that "all rights of creditors and all liens upon the property of either of such companies shall be preserved unimpaired, and the respective companies may be deemed to be in existence to preserve the same; and all debts, liabilities, and duties of either of said companies shall forthwith attach to the new company, and be enforced against it to the same extent as if such debts, liabilities, and duties had been contracted by it."

Smith, who wrongfully negotiated these bonds, continued to be president of the several companies upon their successive consolidations until about the time of the judicial sale before mentioned, and each of them became therefore successively liable for what they carelessly suffered him to do in the matter.

The circumstance that the particular railroad company that executed the mortgage and made the bonds under consideration went out of active existence before the bonds in controversy were negotiated by Smith becomes wholly immaterial in the light afforded by the provisions of this statute. The consolidated corporation succeeds not only to every debt and liability of each constituent company, but to their duties also. It therefore succeeded to all the duties pertaining to these unissued bonds that rested upon the company by whom they were made.

Respecting the effect that the judicial sale should have upon this lien, independently of the rule of *caveat emptor* that is applied to purchasers at such sales, the sale

under consideration was made under a decree that expressly provided that the lien of the mortgage that secured these bonds was not to be effected or prejudiced by the decree or sale. It is true that the purchasers at the sale supposed these bonds had not been negotiated, but they knew a thousand of the bonds had been authorized, and that their form was such that they would pass from hand to hand by mere delivery, and made no inquiry at all about them. Their production and cancellation could have been demanded, and in prudence should have been. If their production had been demanded the fact that they were outstanding would have been revealed, and the lien of the holder preserved. One who neglects so obvious a precaution should abide the consequences.

The same considerations apply to the conveyance afterwards made by the purchasers at the judicial sale to The Chicago, St. Louis & Pittsburg Railroad Company. If the purchase by Scott and his associates is not to be regarded as really made on behalf of the company to which the property was afterwards conveyed, nevertheless the latter received the deed without inquiry concerning the bonds in question, and it is chargeable with notice of the existence of the mortgage, the character of the bonds it secured, and that they might be outstanding in the hands of innocent purchasers.

Upon any adjustment of the equities growing out of the transaction we discover no circumstance that relieves the plaintiff in error from the rule of *caveat emptor*.

The doctrine of *lis pendens*, however, is invoked to defeat the lien of defendants in error.

In November or December, 1875, when the bonds in controversy were pledged by Smith for his personal obligation, and afterwards, in 1878, when the defendant in error bought them, the action heretofore referred to, brought in February, 1875, to foreclose the subsequent mortgages, was pending, and the property had been placed in the hands of receivers. Under the doctrine of *lis pendens* plaintiff in

error insists that the purchaser of the bonds was chargeable with notice of these actions, and during their pendency could acquire no lien upon property in the hands of the court. These actions were pending in the United States Court in Illinois, Indiana, and Ohio. While they embraced the property pledged to secure the payment of bonds in controversy, no relief was sought or obtained in respect of these bonds. In view of this circumstance and of the knowledge of their existence, which we have seen should be imputed to the purchaser at the judicial sale, and to the plaintiff in error, and their omission to call for the production and cancellation of any bonds that might not have been negotiated, would make the application of the doctrine of *lis pendens* to the defendant in error extremely harsh, even if the bonds were not negotiable. However, as the doctrine of *lis pendens* does not apply to negotiable paper purchased before due, in due course of business, that question requires no further consideration. Stone vs. Elliott, 11 Ohio St. 252.

The bonds in controversy were not negotiated until 1875, and if their lien dates from that event the two issues of bonds under the subsequent mortgages would be entitled to a prior lien on the property, and the aggregate amount of those two subsequent issues was greater than the sum realized from the sale of the property under the decree of foreclosure. If all that was true the defendant in error would be entitled to demand a resale of the property, for the mortgage made to secure his bonds was not affected by the decree and sale under which plaintiff in error claims title.

But the date of the lien of the bond does not depend upon the date of their original negotiation. The entire series stand upon a footing of exact equality in this respect. The first one issued has no better or earlier lien than the last one. To distinguish between and give priority of lien among a series of railway or other bonds secured by the same mortgage and in the hands of different bona fide holders according to the time each may have been issued

would contravene the manifest design of the maker. It would also be wholly impracticable, leading to interminable disputes, besides stamping upon each bond a doubt respecting the share of the proceeds of the mortgaged property that would be applied to its payment. If issued early it would be paid in full perhaps; if late it might receive nothing.

The several propositions urged upon our consideration to defeat the claim of defendant in error we find to be unsound in principle or inapplicable to the facts as they were found by the Court of Common Pleas.

Judgment affirmed.

SPEAR, J. (dissenting).

I dissent from the judgment of affirmance. My point is, that after a railroad corporation has become merged in a new company by consolidation with other companies it has not power to issue bonds and thereby create a lien on the property of the new company, even though the bonds had been duly signed and a mortgage executed and recorded before the consolidation purporting to secure a payment of the bonds. That is this case, as is shown by the sixth finding of fact at page 49 of the printed record, taken in connection with the findings recited in the majority opinion.

No. 552. Nov 16.

Reply Brief for Defendant in Error on Motion to Dismiss Writ of Error.

D. C. (on mo.)

Filed Oct. 28, 1896.

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JAMES H. McK

Supreme Court of the United States.

The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company,

Plaintiff in Error,

No. 552.] ***vs.***

The Long Island Loan and Trust Company, Executor of Charles R. Lynde, Deceased.

Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

E. W. KITTREDGE,
JOSEPH WILBY,
For Defendant in Error.

The Robert Clarke Company, Printers, Cincinnati. [*October, 1896.*

Supreme Court of the United States.

The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company,

Plaintiff in Error,

No. 552.] *vs.*

The Long Island Loan and Trust Company, Executor of Charles R. Lynde, Deceased.

Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

Plaintiff in error has filed two briefs in opposition to the motion to dismiss the writ of error in this case; and we should have no occasion to reply to them but for the misapprehension, and consequent misstatement, of the facts disclosed by the record.

In the brief of Mr. Maxwell, page 2, it is said that:

> "The facts alleged in that defense, in the answer, with reference to those proceedings (the foreclosure suits) are all established by the special finding of facts."

This is a mistake. The answer alleged that Archibald Parkhurst, the trustee under the Lynde mortgage, was made a party to the foreclosure proceedings, and was duly served with process according to law, or appeared therein. (R., 16.)

This fact is *not* established by the finding of facts in the state court. But, on the contrary, it is established by the finding of facts that "the actions for the foreclosure of said

mortgage, and for other purposes, did not affect the Parkhurst mortgage aforesaid, or the bonds thereby secured." (R. 34.) And it is further established by the finding in the state court, which is not alleged in the answer, that the decree in the foreclosure suits in the federal courts provided that the property should be sold subject to the Parkhurst mortgage and without prejudice to the bonds secured thereby. (R. 36.)

Now, something more is necessary to present a federal question than, as stated by Mr. Burr (Brief, page 3), that it should appear that a case was made "where a title or right is *claimed* under an authority exercised under the United States, and the decision of the state court was in denial of the right or title so asserted." It must appear by the record upon what the *claim* thus made was founded, and that the judgment of the federal court, under which the title or right claimed is asserted, was one which bound the adverse party. It does not appear what were the issues in the foreclosure suits, and as neither Mr. Lynde nor any person representing him is shown by the record to have been a party to those suits in the federal courts, the judgments in those cases could not affect him.

The case cited by our learned adversaries decided by this court, *Embry* v. *Palmer*, 107 U. S. 3, states the rule as to when a federal question is raised in such a case, and it is when a state court refuses to give effect to the judgment of a court of the United States, "rendered upon a point in dispute, and with jurisdiction of the case and of the parties." This record does not show that the state court had before it any such judgment of the federal courts.

The only question in the case then is, was the appointment of a receiver by the federal court to take possession of the property, subject to the prior mortgage, in an action to which the prior mortgagee was not a party, such an order as to affect the lien of a *bona fide* holder for value of the bonds

secured by the prior mortgage? No question was raised or can be raised upon the facts found by the court below in respect to the authority of an agent to execute commercial paper or to antedate it. If such a question could be raised, it would not be a federal question. If it were true, as Mr. Maxwell argues, that the state court substantially held that Mr. Lynde was entitled to claim that his bonds became a lien at the time they bore date, and that this was erroneous, still this court can not review that holding. But the finding of the court is expressly that the mortgage and the bonds in question were executed in October, 1864, and at that time duly certified by the trustee; the bond containing an express provision that it should be transferable by delivery, and in effect that it should become obligatory when so authenticated by the trustee (R. 7). The state court held that these bonds did become obligatory when they were so executed. It further decided that placing the bonds in the possession of the president of the company, long before the receivership, was a sufficient delivery to validate them in the hands of an innocent purchaser. We respectfully submit that these holdings of the state court present no federal question; and these rulings were conclusive of this case, irrespective of any question as to the creation of a lien pending the receivership.

DeSaussure v. *Gaillard*, 127 U. S. 233 *et seq.*
Hopkins v. *McClure*, 133 U. S. 386.

So also the proposition, ingeniously argued by our learned adversaries, that Mr. Lynde was estopped because he did not make himself a party to the foreclosure suit, but permitted the plaintiff in error to purchase the railroad upon the assumption that Mr. Lynde's bonds were not secured by the Parkhurst mortgage, presents a question that was concluded by the judgment of the state court, and can not be reviewed by this court.

Yet again, the state court decided that the bringing of the foreclosure suits and the appointment of a receiver did

not create a *lis pendens* which would affect the validity of the title of a *bona fide* holder of commercial paper, or of a mortgage security as an incident to that title, which was in accordance with the repeated decisions of this court.

In the closing paragraph of Mr. Maxwell's brief, it is stated that the defendant, upon a pretense, which was a mere excuse, brought a vexatious suit in the Circuit Court for the District of Indiana, which, having been decided in the defendant's favor, is now pending on appeal in the Circuit Court of Appeals for the Seventh Circuit. The Circuit Court for the District of Indiana, and the Supreme Court of Ohio, have both decided that the appellee's claim in that case was not a pretense, and the statement of the brief is an impertinent reflection both upon the appellee and its counsel.

The appellant's claim in the Circuit Court of Appeals is that the judgment in the state courts of Ohio is a bar to the proceeding in the Circuit Court of Indiana, and its judgment should therefore be reversed. In this Court its claim is that the judgment of the state courts of Ohio should be reversed. And appellant's counsel have by brief suggested to the Circuit Court of Appeals the pendency of this writ of error in the Supreme Court apparently to delay the decision of the Circuit Court of Appeals. In this Court it is suggested by them that the pendency of the case in the Circuit Court of Appeals should induce this Court to overrule the motion to dismiss this writ of error.

It does thus seem, if it is proper, as Mr. Maxwell says it is, to go outside of this record, that this writ is prosecuted "for delay only;" and this appears also by the record as well as that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Respectfully submitted,

E. W. KITTREDGE,
JOSEPH WILBY,
For Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE LONG ISLAND LOAN AND TRUST COMPANY, Executor of Charles R. Lynde, deceased,
Defendant in Error.

No. 195.

October Term, 1897.

Error to the Supreme Court of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This action was commenced in the Common Pleas Court of Franklin County, Ohio. It was to foreclose a mortgage, known as the Parkhurst mortgage, to secure certain negotiable bonds, and resulted in a decree of foreclosure, which was affirmed by the Circuit Court, and afterwards by the Supreme Court of Ohio. (See opinion, R. 53.)

The defendant in error heretofore filed a motion to dismiss the cause for want of jurisdiction, which was postponed by this court until the hearing upon the merits. The briefs in support of the motion are among the files in the case.

No assignment of errors was made or returned with the writ under Rev. Stat. Sec. 997. No assignment of errors within the requirement of Rule 21 of this court, as we understand it, is made in the brief for plaintiff in error. (Deitsch v. Wiggins, 15 Wall. 539.)

The bill of exceptions taken in the trial court (R. p. 46, Fol. 76) is not brought to this court.

The only error argued in the brief filed for the plaintiff in error that can be supposed to present a Federal question is that the State court failed to give the effect claimed for it by the plaintiff in error to a decree of foreclosure and sale of the property rendered in a former action in the Circuit Court of the United States in favor of a subsequent mortgagee of the same property.

The record of the prior suit in the United States Circuit Court is not made a part of the record in this case. The finding of facts by the Court of Common Pleas of Franklin County in respect to the action in the Circuit Court of the United States contains no statement of the pleadings in the United States Circuit Court, or of the issues joined in that litigation, except the statement that they did "not affect the Parkhurst mortgage or the bonds thereby secured." (R. 34.)

Neither Parkhurst nor defendant in error's testator (Charles R. Lynde), nor any person representing him, was a party to the action in the United States Circuit Court. The decree of foreclosure in that case provided that the

property "should be sold subject to the outstanding sectional bonds prior in lien to the mortgage involved in that action, and to all other, if any, paramount liens thereon" (R. 36); and "that nothing in said decree contained should, in any manner, affect, prejudice or preclude the holders of said paramount liens, or any of them, but that said decree should be without prejudice to the right of them, and each of them."

The Common Pleas Court, after the finding of facts, stated its conclusions of law; among others, that the equities of the case were in favor of the plaintiff Lynde. The only exception taken by the plaintiff in error in the trial court was "to each and all of the conclusions of law the said defendant The P. C. C. & St. L. Ry. Co. then and there excepted" (R. 41). No motion for a new trial was filed in the trial court by the plaintiff in error.

The petition in error filed in the Circuit Court of Franklin County, Ohio, made no special reference to any error of the trial court in respect to the decree of foreclosure of the Circuit Court of the United States. (R. 47.)

The petition in error in the Supreme Court of Ohio failed to "specially set up or claim" any such error of the trial court or of the Circuit Court of Ohio. (R. 5.)

The Parkhurst bonds contained, among other things, the following provisions:

(R. 7.) "This bond shall be transferable by delivery, or it may be registered as to its ownership on a registry to be kept by the company, and, being so registered, it shall then be transferable only on the books of the company, until released from such registry on said books by its owner.

"This bond shall not be obligatory until it shall have been authenticated by a certificate annexed to it duly signed by the trustee."

The bonds were all, at the time of their date, signed and sealed by the corporation (R. 24), and were certified, in the manner provided, by Archibald Parkhurst, the trustee. They were placed by the maker in the custody of its President, B. E. Smith, who sold them, representing them to be his individual property. (R. 31.) Charles R. Lynde was a bona fide purchaser of the bonds, for value, before their maturity, and without notice of any defect in them, from a previous holder, who was likewise a bona fide purchaser, for value, without notice. They were all registered in the name of Charles R. Lynde at the company's registry in New York at the time of their purchase by him. (R. 37–39.)

The Supreme Court of Ohio held, as matter of law, that, upon these facts found by the trial court in respect to the execution of the bonds, and of the certificate by the trustee of the mortgage, they became a lien upon the mortgaged property from the date of the record of the mortgage, which was many years prior to the foreclosure proceedings in the United States Circuit Court. (R. 53.)

When the bonds in question were executed and certified by the trustee and delivered to the president of the mortgagor company, as stated, they remained in his possession until November, 1875, when, representing that he was individually the owner of said bonds, he negotiated them for value to bankers in Philadelphia, from whom they were afterwards acquired by Charles R. Lynde. (R. 37.)

On February 2, 1875, the trustees of the subsequent mortgage commenced the proceeding in the United States Court hereinbefore referred to for the foreclosue of said mortgage. On the same day receivers were appointed by that court to receive the rents and profits thereof from the

lessee in possession of the mortgaged premises. The receivers thereafter paid two of the coupons upon Mr. Lynde's bonds, and subsequently refused to pay any more. (R. 39.)

POINTS FOR DEFENDANT IN ERROR.

I. The record presents no Federal question that this court will review.

Oxley Stave Co. v. Butler County, 166 U. S. 648.
Fowler v. Lamson, 164 U. S. 252.
C. N. & W. Ry. Co. v. Chicago, 164 U. S. 454.

II. The decision of the State court is based upon an independent ground, not involving a Federal question, and broad enough to maintain its judgment. Wherefore this court has no jurisdiction.

Mo. Pac. Ry. Co. v. Fitzgerald, 160 U. S. 556.
Hammond v. Johnston, 142 U. S. 73.

III. It is well settled that a sale of real estate under judicial proceedings concludes no one who is not a party to those proceedings. As neither Archibald Parkhurst, as trustee, nor Charles R. Lynde was a party to the suit for the foreclosure of the subsequent mortgage in the United States Court, they remain unaffected by the proceedings or judgments in that case.

Telegraph Co. v. Deposit & Trust Co., 147 U. S. 431.
Embry v. Palmer, 107 U. S. 3.
Dupasseur v. Rochereau, 21 Wall. 130.

IV. The doctrine of *lis pendens* has no application to commercial paper; and no defense is allowed to anyone

against a mortgage to secure negotiable paper that is not a valid defense to the paper itself.

Carpenter v. Longan, 16 Wall. 271.

Sawyer v. Prickett, 19 Wall. 146, at p. 166.

C. Ry. Eq. Co. v. Bank, 136 U. S. 268, at p. 283.

Farmers' L. & T. Co. v. T. & S. H. R. Co., 54 Fed. Rep. 759.

V. The decree in the United States Court expressly provided that it should not affect prior mortgages or liens, one of which was the mortgage made to Parkhurst to secure one thousand bonds. The Supreme Court of Ohio rightly held that such a decree furnished no defense to this action. (Rec. pp. 36, 62–63.)

ARGUMENT.

I.

It is difficult to perceive how this court can determine the effect of the decree of foreclosure in the Circuit Court of the United States in the case of Roosevelt and Fosdick v. C. C. & I. C. Ry. Co., *et al.* None of the pleadings in that case are in the record. No evidence is presented to this court; no exceptions to any ruling presenting any Federal question; no error assigned in the State courts predicated upon any such ruling. True, there is a general exception to the conclusions of law of the trial court, upon the forty-seven findings of fact which were made. (R. 41.)

All this court can know about the issues, or the character of that litigation, is that it was an action for a foreclosure of a subsequent mortgage, but not affecting the Parkhurst mortgage or the bonds thereby secured; and that a cross

petition was filed, but asking no relief against the Parkhurst mortgage or the bonds secured thereby. (R. 34.) The Railway Co. and one Frederick R. Fowler were made defendants and served with process. The terms of the decree, to which we shall refer in another place, exempted the Parkhurst mortgage and the bonds secured thereby from any prejudice.

How is this court to ascertain what issues were adjudicated in that case, even as between the parties to the litigation? If we assume that the record of the case was before the State court, how is this court to find what matters were *res adjudicata* by virtue of the judgment in that case? For aught that appears, the Railway Co. that was a defendant, or some other party, may have set up that the entire issue of a thousand bonds secured by the Parkhurst mortgage were outstanding in the hands of bona fide owners for value. If this court is to construe the language of the fragment of the decree that is contained in the record it must have the pleadings before it for that purpose. It must appear affirmatively that a Federal question was raised; that it was presented for decision to the Supreme Court of Ohio; that it was decided adversely to the party complaining, and the facts to enable this court to review the decision must be set forth in the record. Nothing of the kind appears in this record.

In the case of Oxley Stave Co., *supra*, at pages 655, 656, this court says:

"The questions raised and decided in the State Circuit Court point altogether for their solution to the laws of the State, and make no reference whatever to the Constitution or laws of the United States. Undoubtedly this did not preclude the plaintiffs in error from raising the point

in the Supreme Court of the State, if it was involved in the case as presented to that court. And whether a writ of error from this court will lie or not depends upon the questions raised and decided in that court. But neither of the questions made there by the errors assigned refer in any manner to the Constitution or laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the Act of Congress, or the decisions of this court."

II.

It does affirmatively appear that the Supreme Court of Ohio, upon the facts found by the trial court in respect to the execution of the bonds and the certificate by the trustee of the mortgage, found that the bonds became a valid lien upon the property long prior to the proceedings in the Federal court. Say the court in its opinion, after quoting the provision of the deed recited in the bonds:

(R. 55.) "The statement that the bonds should not become obligatory until thus authenticated (by the trustee) is equivalent to a declaration that when duly executed by the company, and so authenticated, their obligatory character shall be complete. They then became perfect in form, and, by their express terms, transmissible by delivery."

And, again, upon page 65 of the record,

"The date of the lien of the bonds does not depend upon the date of their original negotiation. The entire series stand upon a footing of exact equality in this respect. The first one issued has no better or earlier lien than the last one. To distinguish between and give priority of lien among a series of railway or other bonds secured by the same mortgage, and in the hands of different bona fide

holders, according to the time each may have been issued, would contravene the manifest design of the maker."

Trust Co. v. Iron Works, 51 N. J. Eq. 605.

Clearly this construction of the force and effect of this provision in the bonds in question was warranted by the facts before the court. And this ruling of the Supreme Court of Ohio is independent of any Federal question sought to be raised upon this record; and it is broad enough to sustain the judgment of the State court irrespective of any such Federal question.

We respectfully submit that this ruling of the Supreme Court of Ohio is not subject to review by this court in accordance with its numerous decisions, of which the court, in the case of Mo. Pac. Ry. Co. v. Fitzgerald, *supra*, at page 576, says:

"1. We repeat what we said in California Powder Works v. Davis, 151 U. S. 389, 393, that 'it is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision could be had, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on independent ground, not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any Federal question that may also have been presented.' Eustis v. Bolles, 150 U. S. 361, and cases cited."

III.

But this record also fails to show that either Mr. Parkhurst, the trustee, or Mr. Charles R. Lynde, or any party representing them, or either of them, was a party to the litigation in the Federal court.

It is true that the Supreme Court of Ohio in its opinion (R. 62) states that "the trustee in the mortgage last made and the trustee in the mortgage made to secure the bonds in controversy were each made parties" to this action in the Federal court. But, so far as the trustee of the bonds in controversy is concerned, this statement in the opinion of the Supreme Court of Ohio is an inadvertence. The finding of fact upon this subject is set forth upon page 34 of the record. And, of course, it is the record and not the opinion of the court that is conclusive as to this fact.

In the case of Telegraph Co. v. Deposit & Tr. Co., *supra*, this court decided, as stated in the syllabus, that

"A sale of real estate under judicial proceedings concludes no one who is not a party to those proceedings."

And, upon page 448 of the opinion, the court say:

"It is well settled that a sale of real estate under judicial proceedings concludes no one who is not a party to those proceedings. Neither the Rapid Co. nor the plaintiff was a party to the suit for the foreclosure of the mortgage of the Bankers' Co. Therefore, whatever title either of them had to the property which was attempted to be sold in that foreclosure suit remained unaffected by the suit. The same fact is true of the attempted sale in the Ohio proceeding, set up in the answer. Neither the Rapid Co.

nor the plaintiff was a party to that proceeding, and the attempted sale under it did not bar or impair their rights."

Of course there could be no controversy upon the proposition thus declared by this court. But the very basis of the doctrine upon this subject is laid down in the opinion delivered by Mr. Justice Matthews, in the case of Embry v. Palmer, 107 U. S. 3, in the following statement: (P. 8.)

"The jurisdiction of the court invoked by this writ of error is conferred by Sec. 709, Rev. Stat., it being a case in which a title or right is claimed under an authority exercised under the United States, and the decision of the State court being in denial of the title or right so asserted. It was decided in Dupasseur v. Rochereau, 21 Wall. 130, that such a question is undoubtedly raised whenever 'a State court refuses to give effect to the judgment of a court of the United States, *rendered upon a point in dispute, and with jurisdiction of the case and of the parties.*'"

(Italics ours.)

The same principle is applied in the elaborate opinion in the case of Dowell v. Applegate, 152 U. S. 337.

How then can it be said that any proceeding, or the final judgment, in a case to which Charles R. Lynde was not a party, can adjudicate or affect his rights? Or, how can it be said that any Federal question was raised by the refusal of a State court to give any effect against a litigant, to a judgment of any court of the United States in a case to which the litigant in the State court was neither a party nor a privy, and wherein he is not chargeable with either actual or constructive notice of the proceedings. In proceedings strictly *in rem* the whole world are deemed parties. But the foreclosure of a mortgage is not such a proceeding.

But it is urged by our adversaries that receivers were appointed in the case in the Federal court to take posses

sion of the property other than the road, and to collect the rents from the lessee of the road. The appointment of a receiver does not affect or divest existing liens in favor of persons not parties to the proceeding. They will be recognized and enforced as though no receiver had been appointed. And when the possession of the court is terminated and its final judgment entered, other courts are not affected by this possession of a receiver in considering the rights of persons not parties to the litigation.

It is a little singular that in support of their position our learned adversaries cite the case of Buck v. Colbath, 3 Wall. 334 (Br. 11), stating that it was a case where a United States Marshal was sued in trespass for taking the goods of a third person under a writ of attachment. He pleaded the authority of his writ, etc. But counsel overlook the statement of Mr. Justice Miller in deciding that case, at p. 342, as follows:

"It is only while the property is in the possession of the court, either actual or constructive, that the court is bound, or professes, to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights required them to take possession of the property or not. . . . It is upon this ground that the court, in Day v. Gallup (2 Wall. 97), held that this court had no juisdiction of that case. The property attached had been sold, and the attachment suit ended, when the attaching officer and his assistants were sued, and we held that such a suit in the State court, commenced after the proceedings in the Federal court had been concluded, raised no question for the jurisdiction of this court."

But it is urged by our adversaries that there was no existing lien for the security of the bonds in controversy at the time of the appointment of the receiver. That was a mixed question of law and fact which the Supreme Court of Ohio decided adversely to the plaintiff in error. Precisely the same question arose in the case of Dupasseur v. Rochereau, *supra*. The appellant in that case claimed that the lien of the appellee was subsequent and not prior to the mortgage of the appellant and, under the law of Louisiana, that it was, therefore, extinguished by the judgment in the Circuit Court of the United States. Say the court in its opinion, on page 138:

"Now that is the very point in dispute. Rochereau insists that by the non-inscription of the Jacobs mortgage within ten years it lost its rank, and became the subsequent and not the prior mortgage. Grant that Rochereau was the subsequent mortgagee, and all that the appellant claims would necessarily follow. But that point is not granted; on the contrary it is the very matter in dispute, and on this vital point we think that Rochereau was not concluded by the judgment of the Circuit Court, because he was not a party to it. Therefore the State court, in not regarding the decision of the Circuit Court as decisive of that question, did not refuse to that decision its due and legal effect."

In like manner the Supreme Court of Ohio decided, as we have already shown, that the lien of the Parkhurst mortgage to secure the bonds in controversy arose long prior to the commencement of the foreclosure suit in the Federal court, or to the appointment of the receiver in that case. And, in not regarding the decision of the Federal court as decisive of that question, it did not refuse to that decision its due and legal effect; and its determination presents no Federal question for the consideration of this court.

Our adversaries have considerable to say in their brief about the several consolidations of the mortgagor with other companies, as affecting a revocation of the authority that B. E. Smith originally had, when they were placed in his possession, to sell the bonds in question.

But this proceeds upon a misconception of the case presented by this record. Nobody, so far as we are aware, has ever contended that Smith was acting as agent for either of the companies when he sold these bonds in 1875; and no one has ever claimed that the bonds were issued by the mortgagor or its successor in 1875. No other delivery by the maker was necessary than that made when they were placed in the custody of Smith. The claim made by the plaintiff below, and the decision upon it by the Supreme Court of Ohio, is thus stated by that court (R. 57):

"Where this class of paper, complete in form and transmissible by delivery, is placed by the maker or owner in the custody of one who is thereby clothed with apparent power of disposition, and the custodian avails himself of the opportunity thus afforded him to negotiate it to an innocent party, the title of the holder is not to be tested by principles applicable to stolen securities, but by principles properly applicable to the transaction as it actually occurred. That the title to negotiable securities may pass by virtue of such a transaction as the finding of fact shows occurred in respect to the negotiation of the bonds in question is, we think, clear upon principle and sustained by authority. Railway Co. v. Sprague, 103 U. S. 756. Fearing v. Clark, 16 Gray, 74."

Professor Ames, in his recent work, Cases on Bills and Notes, Vol. II, page 865, states the doctrine upon this subject, as applicable to the case at bar, as follows:

"But one who has signed a bill or note will not always

be permitted to rely upon the absence of such delivery in order to defeat the title of a purchaser for value without notice; *e. g.*, the title of such a purchaser is unimpeachable, although the paper was delivered to a third person as an escrow, and afterward wrongfully delivered by him to the payee before condition performed. (Fearing v. Clark, 16 Gray, 74.)"

Bigelow, Chief Justice, speaking for the Supreme Court of Massachusetts, in the case of Fearing v. Clark, *supra*, says:

"It is undoubtedly true that, as between the original parties to a note, or those who took it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense, delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a *bona fide* holder. In such case a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note."

See also

Worcester County Bank v. Dorchester Bank, 10 Cush. (64 Mass.) 488.

Kinyon v. Wohlford, 17 Minn. 239.

Jones on Railroad Securities, Sec. 210.

IV.

The doctrine of *lis pendens* has no application to commercial paper. Our adversaries, who admit that this is true, assert that while they may concede that Charles R. Lynde, as an innocent holder, for value, could recover upon the bonds in an action at law, that it does not follow that the mortgage is in like manner exempt from the application of the doctrine of *lis pendens*.

We suppose that it will not be claimed that a purchaser at a judicial sale takes any better title than was possessed by the parties to the litigation. And we do not understand that the case of Carpenter v. Longan and the subsequent cases cited under our Fourth point admit of the construction that is sought to be given to them. On the contrary, we suppose that those cases have finally settled that a mortgage, or deed of trust in the nature of a mortgage, to secure negotiable bonds is merely incident to the bonds, and partakes of the negotiability of its principal, viz., of the bonds themselves. It surely can not be necessary for us to argue this point in this court, in view of the decisions to which we have referred. The proposition is concisely stated in the opinion of this court by Mr. Justice Harlan, in Railway Co. v. Merchants' Bank, 136 U. S. at p. 283.

"When a note secured by a mortgage is transferred to a *bona fide* holder for value, before maturity, and a bill is filed to foreclose the mortgage, no other or further defenses are allowed against the mortgage than would be allowed were the action brought in a court of law upon the note."

The Supreme Court of Ohio, which held otherwise in the case of Bailey v. Smith, 14 O. S. 396, followed the decisions of this court in the cases cited in respect to a railroad mortgage made to a trustee to secure the negotiable bonds of a railroad company. This ruling of the Supreme Court of Ohio raises no Federal question; but, if it did, its determination is in accordance with the settled doctrine of this court.

V.

As to the questions whether the delivery of the bonds by the maker, in 1864, to B. E. Smith, for a specific purpose, was a sufficient delivery to validate them in the hands of a bona fide purchaser for value; whether the bonds from that time had a legal existence as contractual obligations; whether the company was estopped to deny their validity from that date; whether Mr. Lynde was estopped by failure to institute proceedings of any kind upon his bonds at an earlier date; whether the litigants in the Federal court were negligent in not requiring these bonds to be surrendered by Smith; these and all other questions discussed by our learned adversaries do not seem to us to present any Federal question, but, on the contrary, they are concluded by the judgment of the Supreme Court of Ohio. B. E. Smith's possession of the bonds at the time when he sold them as his own was precisely that of the President of the railway company in Railway Co. v. Sprague, 103 U. S. as stated at p. 760.

VI.

And finally, it seems to us that the fragment of the decree of the Federal court, recited in the 28th Finding of Fact (R. 36), having expressly provided that

"the said property should be sold subject to the outstanding sectional bonds prior in lien to the mortgage to said Roosevelt and Fosdick . . . and that nothing in said decree contained should in any manner affect, prejudice or preclude the holders of said paramount liens, or any of them, but that said decree should be without prejudice to the right of them, and each of them,"

it follows that said decree in no manner affected the right of Charles R. Lynde, as a holder of bonds secured by the Parkhurst mortgage, in an action to foreclose that mortgage.

Our adversaries recite the further language of said decree,

"That the purchaser of said mortgaged premises should hold, possess and enjoy the same, and all the rights, privileges and franchises appertaining, as fully and completely as the said C. C. & I. C. Ry. Co., at the commencement of said suit, held, or now holds and enjoys, or is entitled to hold or enjoy the same, but free from the liens then represented by any party to said cause. . . . And that thereby the defendants in said suits, respectively, and all persons claiming or to claim under them, or any of them, subsequent to the beginning of said suits by the said Roosevelt and Fosdick as purchasers, incumbrancers, or otherwise howsoever, should be, and that they thereby were forever barred and foreclosed of and from all right, etc., in or to the premises and property so sold."

Surely the language of these two provisions is consistent and can leave no doubt that the Circuit Court of the United States provided that its decree in that case should forever bar all parties and their privies in that case, and that it should not, in any wise, affect the bonds, or mortgages to secure the same, that were senior to the mortgages that were being foreclosed, and that were not represented by any parties in that litigation.

This was the construction placed upon the decree of the United States Circuit Court by the Supreme Court of Ohio. And we submit that that court rightly held that such a decree furnished no defense to this action by the executor of Charles R. Lynde.

E. W. KITTREDGE,
JOSEPH WILBY,
Counsel for Defendant in Error.

foreclosure proceedings in the Circuit Courts of the United States, under which the plaintiff in error claims title to the lands and property in question in this suit.

Under the circumstances stated in the finding of facts, Lynde acquired a good title (as between himself and the mortgagor company and the companies which succeeded it by consolidation,) to the thirty-six bonds purchased by him, as well as the right to claim the benefit of the mortgage executed to Parkhurst.

The state court having adjudged that there was no rule of law arising out of the public policy of the State, as manifested by state legislation, that required it to deny to the holders of those bonds the rights and privileges pertaining to commercial paper, purchased in good faith, in the ordinary course of business; and in view of the fact that the lien attending the thirty-six bonds purchased by Lynde did not arise after the institution of the foreclosure suits, but had its origin in the execution and delivery of the Parkhurst mortgage and the authentication by the trustee of the bonds named in it; and in view of the further fact that the trustee in the prior mortgage was not made a party to the foreclosure suits, and was not bound by the decree; under the well settled rule that a sale of real estate under judicial proceedings concludes no one who is not, in some form, a party to such proceedings, this court holds, that the pendency of the foreclosure suits did not interfere with the negotiation or transfer of the bonds secured by the prior Parkhurst mortgage; that the decree in those suits did not impair in any degree the lien created by that mortgage; that the purchase of the bonds by Lynde could not be regarded as hostile to the possession taken of the property embraced by the Roosevelt mortgage for the purpose of selling it in satisfaction of the debts secured thereby; and that the state court did not fail to give due effect to the several decrees in the Circuit Courts in the Roosevelt foreclosure suits, when it held that those decrees did not prevent the defendant in error from claiming the benefit of the lien created by the mortgage to Parkhurst to secure the payment of the bonds purchased by Lynde.

The case is stated in the opinion.

Mr. Charles E. Burr and *Mr. Lawrence Maxwell, Jr.*, for plaintiff in error.

Mr. E. W. Kittredge and *Mr. Joseph Wilby* for defendant in error.

Mr. Justice Harlan delivered the opinion of the court.

This writ of error brings up for review a final judgment of the Supreme Court of Ohio affirming a judgment of the Circuit Court of Franklin County, in that State.

Opinion of the Court.

The general question presented for determination is whether certain railroad property may be sold in satisfaction of a judgment obtained in 1891 by Charles R. Lynde in the Circuit Court of the United States for the Southern District of Ohio for the amount of 36 coupon bonds, part of 1000 bonds issued by the Columbus and Indianapolis Central Railway Company, an Ohio corporation, in the year 1864.

The bonds were secured by a deed of trust, and were made payable to William D. Thompson or bearer, on the 1st day of November, 1904, each bond reciting, among other things, that it was one of an issue of not exceeding $1,000,000, and had a special lien on all of the railway property, equipments and franchises of the company, as mentioned in the above deed of trust, subject to prior mortgage liens of $3,200,000; that it should "be transferable by delivery, or it may be registered as to its ownership on a registry to be kept by the company, and being so registered, it shall then be transferable only on the books of the company until released from such registry on said books by its owner;" also, that it "shall not become obligatory until it shall have been authenticated by a certificate annexed to it, duly signed by the trustee."

To each bond was attached this certificate: "I hereby certify that this bond is one of the series of bonds described in and secured by the deed of trust or mortgage above mentioned. — A. Parkhurst, *Trustee*."

The property and rights covered by the above deed of trust, and which were ordered to be sold by the decree in this case if the Columbus, Chicago and Indiana Central Railway Company did not, by a named day, pay the amount found due to the plaintiff, was a line of railroad extending from Columbus, Ohio, to Indianapolis, Indiana, including a branch from Covington to Union, together with the franchises, equipment, property, tolls and interests appertaining thereto.

The case made by the record is set forth in an extended finding of facts covering sixteen pages of the present transcript. Many of the facts so found are not necessary to be here stated. Those which bear more or less upon the present inquiry may be thus summarized:

PITTSBURGH, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY *v.* LONG ISLAND LOAN AND TRUST COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 16. Argued April 11, 12, 1898. — Decided January 9, 1899.

In view of the statute giving this court authority to reëxamine the final judgment of the highest court of a State, denying a right specially set up or claimed under an authority exercised under the United States, this court has jurisdiction to inquire whether due effect was accorded to the

The Columbus and Indianapolis Central Railway Company prepared, signed and sealed the 1000 bonds referred to, (part of which were the 36 bonds held by Lynde,) and to secure the same executed and delivered the mortgage or deed of trust to Archibald Parkhurst, as trustee.

The above deed recited the consolidation of the Columbus and Indianapolis Railroad Company and the Indiana Central Railway under the name of the Columbus and Indianapolis Central Railway Company, the consolidated company becoming liable for and assuming all the just debts and liabilities of the respective constituent companies; that, for certain purposes, a new series of bonds, 1000 in number, and each for $1000, should be issued, dated November 1, 1864, to be secured by a deed of conveyance covering the mortgagor company's road, its appurtenances, franchises, equipments, property, tolls, income and interest, to a trustee to secure the payment of said bonds and interest warrants. Such a deed was made, and conveyed to A. Parkhurst, trustee, for the "purpose of assuring the punctual payment of the said 1000 bonds and each of them to each and every person who may become the holder of the same or any of them," the mortgagor company's entire railroad from Columbus to Indianapolis, including the branch from Covington to Union, its franchises, etc., in trust to secure the bonds about to be issued by it. The deed contained all the provisions usually found in such instruments.

Parkhurst accepted the trust, and the mortgage or deed of trust was duly recorded in Ohio and Indiana.

Shortly after the signing and sealing of the 1000 bonds they were all duly certified by the trustee in the form above stated.

Prior to January 1, 1867, of the 1000 bonds 790 had been duly issued *in exchange* for a like number and amount of the existing second and third mortgage bonds of the Columbus and Indianapolis Railroad Company as provided in said mortgage, and 31 of said bonds had been duly issued and sold by the railway company. The highest serial number of the 821 bonds so exchanged and sold was No. 833. The remaining 179 of the 1000 bonds, including the 36 bonds described in the petition, having been delivered prior to 1870 by the trustee, Park-

hurst, to Benjamin E. Smith, as president of the company, remained in the latter's possession as president, and the companies into which the same was successively consolidated as hereinafter set forth, until the months of November and December, A.D. 1875, and the happening in those months of the events to be presently stated.

On or about the 11th day of September, 1867, the Columbus and Indianapolis Central Railway Company, which made the above mortgage of 1864, was consolidated with the Union and Logansport Railroad Company and the Toledo, Logansport and Burlington Railroad Company, and became the Columbus and Indiana Central Railway Company; and on or about the 12th day of February, 1868, the latter company and the Chicago and Great Eastern Railroad Company were consolidated and became the Columbus, Chicago and Indiana Central Railway Company, one of the defendants in this action.

No authority or consent was thereafter given by the board of directors of the Columbus, Chicago and Indiana Central Railway Company for the issue or sale of the above 179 bonds or any of them.

The Columbus, Chicago and Indiana Central Railway Company on or about the 20th day of February made and executed its 15,000 bonds of that date, each for the sum of $1000, bearing interest at the rate of seven per cent per annum; and in order to secure their payment executed and delivered its mortgage or deed of trust of that date to James A. Roosevelt and William R. Fosdick, trustees, conveying to them all its property — such conveyance including the property formerly belonging to the Columbus and Indianapolis Central Railway Company that had been previously conveyed to Parkhurst, trustee. That mortgage was recorded in the States of Ohio, Indiana and Illinois immediately after its execution.

Afterwards, and before Roosevelt and Fosdick, trustees, began the foreclosure suit hereinafter mentioned, the Columbus, Chicago and Indiana Central Railway Company issued and sold of the 15,000 bonds so secured, bonds to the amount of $10,428,000 or more.

On or about the 15th day of December, A.D. 1868, the

Columbus, Chicago and Indiana Central Railway Company made and executed its 5000 bonds each for the sum of $1000, of that date and due upon the 1st day of February, A.D. 1909, with interest at seven per cent per annum, and for the purpose of securing their payment executed and delivered its second mortgage or deed of trust to Frederick R. Fowler and Joseph T. Thomas, trustees, conveying to them all its property including the property described in the petition; which mortgage was immediately thereafter duly recorded in Ohio, Indiana and Illinois.

It was set forth in the latter instrument that the mortgagor, in addition to $15,000,000 of first mortgage bonds, was then indebted for outstanding bonds as follows, to wit: Second mortgage bonds of the Columbus and Indianapolis Central Railway Company, $821,000; income bonds of the Columbus and Indiana Central Railway Company, $1,243,000, and Chicago and Great Eastern Railway Company construction and equipment bonds, $400,000; total, $2,464,000; and that it was further indebted in other liabilities in the estimated sum of $2,500,000. It was provided in the Fowler-Thomas mortgage that of the issue of $5,000,000 of bonds, the sum of $2,500,000, being bonds numbered 2501 to 5000 inclusive, should be set aside and used only in exchange for and to satisfy the above $2,464,000 of bonds.

The 821 second mortgage bonds of the Columbus and Indianapolis Central Railway Company referred to in said mortgage were part of the bonds secured by the mortgage to Parkhurst, trustee.

On or about the 22d day of January, 1869, the Columbus, Chicago and Indiana Central Railway Company leased to the Pittsburgh, Cincinnati and St. Louis Railway Company its entire railroad and property, including the railroad and property here in question, for the term of ninety-nine years from the 1st day of February, A.D. 1869, renewable forever. And on or about the 1st day of February, 1869, possession of the leased railroad and property was delivered to the Pittsburgh, Cincinnati and St. Louis Railway Company, which continued to hold possession thereof and to operate the same

as lessee till after the sale to which reference will be presently made.

It was provided in that lease that no bonds beyond the $15,000,000 of first mortgage bonds, secured by the mortgage to Roosevelt and Fosdick, and the $5,000,000 of second mortgage bonds, secured by the mortgage to Fowler and Thomas, and the said $2,000,000 of income bonds, should be issued by the lessor company without the consent of the board of directors of the respective parties to the lease. This lease was duly recorded in the States of Ohio, Indiana and Illinois on or about the 29th day of May, 1873.

On the first and second days of February, 1875, Roosevelt and Fosdick commenced their actions concurrently in the Circuit Courts of the United States for the Southern District of Ohio, the District of Indiana and the Northern District of Illinois for the foreclosure of the mortgage made to them as trustees, and for other purposes, "but," the finding states, "not affecting the Parkhurst mortgage aforesaid or the bonds thereby secured."

In those actions William L. Scott appeared and filed a cross-bill in October, 1881, claiming to be the owner of certain bonds secured by the mortgage to Roosevelt and Fosdick, and praying, among other things, for its foreclosure. But he asked no relief against the Parkhurst mortgage or the bonds secured thereby. Prior to the beginning of the foreclosure suit Thomas resigned his trust under the mortgage made to Fowler and himself, and thereafter that trust was administered by Fowler alone.

In said actions the Columbus, Chicago and Indiana Central Railway Company, Fowler and others were made parties defendant, and were duly served with process or entered their appearance therein.

In the bills of foreclosure the plaintiffs among other things prayed for the appointment of a receiver or receivers of all the railroad, equipment and appurtenances and other mortgaged premises, and of the earnings and income, rents, issues and profits thereof; that the net amount of such earnings should be first applied to the payment of the interest on all the bonds

issued under the mortgage to the plaintiffs, and to the payment of the interest on all mortgage bonds having prior liens on the property, in such order as the court might direct; and that the balance should be applied to the payment of the sums due and in arrears to and for the sinking fund provided for in the mortgage to them for the redemption of the bonds issued under said mortgage.

Such proceedings were had in the foreclosure suits brought in the Circuit Courts of the United States that, on the 2d and 3d days of February, 1875, Roosevelt and Fosdick were duly appointed receivers of the railroad, equipment and appurtenances and other mortgaged premises embraced in and covered by said mortgage, and of the earnings, income, rents, issues and profits thereof; and they were directed not to disturb the possession of the mortgaged premises by the Pittsburgh, Cincinnati and St. Louis Railway Company under the lease to it, but should collect and receive the rental payable by the lessee, and apply the same as provided by the further orders of the court. And in the order of appointment it was further directed that the Columbus, Chicago and Indiana Central Railway Company forthwith transfer and convey to the receivers the said railroad equipment and appurtenances and other mortgaged premises embraced by the mortgage, and including the income, rents, issues and profits thereof. The conveyance so ordered was duly executed and delivered to Roosevelt and Fosdick as receivers, on or about May 25, 1875.

That deed was not recorded, and the plaintiff Charles R. Lynde had no actual knowledge of its existence until the commencement of this action in 1891.

Immediately after their appointment the receivers in pursuance of the above order took possession and control of all said railroad and property, its income, rents, issues and profits, subject, however, to the physical possession and operation of the railroad by the lessee. They continued in possession and control until after the sale of the railroad and the property hereinafter set forth.

Such further proceedings were had in the foreclosure suits that on the 15th, 16th and 23d days of November, 1882, in the

several Circuit Courts, similar decrees were entered, wherein it was adjudged that in case the Columbus, Chicago and Indiana Central Railway Company failed for ten days to pay the sum found due in the decree, the mortgage should be foreclosed and the property conveyed by it — which, as we have seen, *included all the property described in the petition herein* — should be sold for the payment of the principal and interest of said bonds, *subject to the outstanding sectional bonds prior in lien to the mortgage to Roosevelt and Fosdick, and to all other if any paramount liens thereon*, but free from the lien of the mortgage to Roosevelt and Fosdick; that the decree should not in any manner affect, prejudice or preclude *the holders of the paramount liens or any of them*, but should be without prejudice to the rights of them and each of them. It was also adjudged that the purchaser of the mortgaged premises should be invested with, and should hold, possess and enjoy the same and all the rights, privileges and franchises appertaining as fully and completely as the Columbus, Chicago and Indiana Central Railway Company *at the commencement of the suit by Roosevelt and Fosdick held or then held and enjoyed, or was entitled to hold or enjoy, but free from liens then represented by any party to said cause.*

In that decree it was further adjudged that the sale decreed to be made, and the conveyance, after confirmation thereof, to be executed and delivered, should be valid and effectual forever, and that thereby *the defendants in said suits*, respectively, and all persons claiming or to claim under them or any of them, *subsequent to the beginning of the suits by Roosevelt and Fosdick*, as purchasers, incumbrancers or otherwise howsoever, should be forever barred and foreclosed of and from all rights, estate and interest, claim, lien and equity of redemption of, in or to the premises, property, rights and interests so sold and every or any part thereof.

On or about the 10th day of January, 1883, in conformity with the decree, the said property and every part thereof was sold by masters, theretofore appointed to execute the order of sale, William L. Scott, Charles J. Osborn and John S. Kennedy, for the sum of $13,500,000, which sum was insufficient

to pay the outstanding bonds and interest, secured by the mortgage to Roosevelt and Fosdick.

Afterwards, and on or about the 30th day of January, 1883, the Circuit Courts for the Northern District of Illinois and the District of Indiana, and on the 31st day of January, 1883, the Circuit Court for the Southern District of Ohio — the said purchase money having been paid — by orders entered in those causes, duly confirmed and approved the sale, and ordered said premises and property, rights and franchises, to be conveyed to the purchasers, in fee simple, in accordance with the former decrees of those courts. Such a conveyance was made February 21, 1883.

Subsequently, on or about the 17th day of March, 1883, Scott, Osborn and Kennedy, with their respective wives, executed and delivered their deed of that date, conveying said premises and property, rights and franchises, to the Chicago, St. Louis and Pittsburgh Railroad Company, which was authorized to purchase and own the same.

On or about the 10th day of June, 1890, the Chicago, St. Louis and Pittsburgh Railroad Company was duly consolidated with the Pittsburgh, Cincinnati and St. Louis Railway Company, together with other railway companies, under the name of and thereby became the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company.

The latter company was, at the commencement of this suit, and through its predecessors in title have been ever since the conveyance to Scott Kennedy and Osborn, in the actual, peaceable and undisputed possession of all said railroad, premises and property, rights and franchises, including that described in the petition.

The history of the 36 bonds in suit is as follows:

On and before the 1st day of November, 1864, Benjamin E. Smith was the president of the Columbus and Indianapolis Central Railway Company. He continued to be president of that corporation, and of its successors into which it was successively consolidated, until the sale of the railroad hereinbefore mentioned in 1883.

In the months of November and December, 1875, Smith bor-

rowed for his own purposes $48,000 from W. H. Newbold, Son & Co., brokers in Philadelphia, executing and delivering to them his individual notes. At that time he had, as president of the Columbus, Chicago and Indiana Central Railway Company, the custody and possession of the 179 bonds hereinbefore described; and without the knowledge, authority or consent of that company, but falsely pretending to W. H. Newbold, Son & Co. that he was individually the owner of such bonds, delivered certain of them, including the 36 described in the plaintiff's petition, as collateral security for the payment of his notes. He subsequently renewed his notes with the same collateral from time to time until about the 14th day of January, 1878, when the 36 bonds were sold by W. H. Newbold, Son & Co., and the proceeds applied to the payment of Smith's notes. The balance was paid over to him or for his use, and no part of it was used for the benefit of the railway company.

At the time the bonds were so pledged all the past-due coupons had been cut off, and while they were so held as collateral security the subsequent coupons, as they fell due, were cut from the bonds and delivered to Smith, but were never presented for payment.

At the sale of the bonds, Newbold, Son & Co. themselves became the purchasers of the 36 bonds, paying the full market price, and buying them in good faith without knowledge of any defect in them; and thereafter they sent them to New York for sale.

In the months of May, July and August, 1878, Lynde purchased the 36 bonds in good faith in the usual course of business for valuable consideration, (being about ninety cents on the dollar, which was at the time the usual market price for them,) without knowledge or notice of the unauthorized or fraudulent acts of Smith, and without any knowledge or notice that the bonds had not been sold by the Columbus and Indianapolis Railway Company, and thereby became the *bona fide* holder and owner of the bonds and the coupons thereto belonging. Before the 36 bonds had been purchased by him the railway company had not made default in the payment

of interest on them, and no holder prior to Lynde had elected that the principal sum should become due.

At the time Lynde purchased the bonds the coupons due May 1, 1878, were still attached to the bonds and were unpaid.

On or about the 27th day of August, 1878, Lynde presented the 36 bonds for registration to the secretary of the Union Trust Company, New York, which had been designated by the Columbus, Chicago and Indiana Central Railway Company as registering agent for such bonds in the city of New York — to put the bonds in the name of the party registering them and taking them out of the register and making them to bearer; and the secretary then caused the same to be registered in the name of Lynde. At the time of such registration no inquiry was made by the secretary as to whether or not the bonds had been regularly issued by the Columbus and Indianapolis Central Railway Company.

The coupons maturing May 1, 1878, on these 36 bonds which were attached to them when Lynde purchased, were paid to the latter by the firm of A. Iselin & Co., Wall street, New York, upon presentation by Lynde of the coupons in October, 1878; and the 36 coupons maturing November 1, 1878, were paid to Lynde by the same firm upon the presentation of the coupons in April, 1879. Iselin & Co. were acting for the receivers and a bondholders' committee — that committee furnishing the money for taking up the coupons, and being afterwards reimbursed by the receivers. In October, 1879, Lynde presented the coupons falling due May 1, 1879, on the 36 bonds, but Iselin & Co. then declined to pay them, which was the first knowledge or notice of any kind that he had of any discrimination against or difference between those bonds and any other bonds of the same series. And he has never received payment of any coupon on the 36 bonds or any of them since the payment to him as aforesaid of the coupons maturing in November, 1878. At the time the May and November, 1878, coupons were paid, Iselin & Co. had no knowledge but that the 36 bonds had been regularly issued and sold by the Columbus and Indianapolis Central Railway Company.

From the year 1871 until after the purchase by him of the

36 bonds, Lynde held and owned other bonds secured by the mortgage of the Columbus and Indianapolis Central Railway Company to Parkhurst, trustee, above referred to, being some of the 821 bonds before described.

The Columbus, Chicago and Indiana Central Railway Company made default in the payment of the interest coupons upon said 821 bonds due on the first day of May, 1875, and on the first day of November, 1875, and the interest coupons were not paid until after June 30, 1876, when they were paid by or on behalf of the receivers hereinbefore mentioned, all which facts were known to Lynde at the time he purchased the 36 bonds described in the petition.

At the time of the demand made by Lynde upon Parkhurst, trustee, hereinafter set forth, and at the time of the commencement of this action, interest coupons which had theretofore fallen due upon more than seven hundred of said one thousand bonds described in said mortgage had been paid.

On or about the 27th day of June, A.D. 1891, at Newark, in the State of New Jersey, Lynde made a personal request and demand in writing of Parkhurst as trustee, to commence an action for the foreclosure and sale of the premises in accordance with the provisions of the deed of trust, for and on account of the default made by the Columbus and Indianapolis Central Railway Company in the payment of the coupons upon the 36 bonds; and then and there offered to the trustee sufficient security and indemnity to protect him against all expenses and personal responsibility by him to be made and incurred in the commencement and prosecution of an action for the foreclosure and sale of the premises. Parkhurst as such trustee refused to take the action requested.

The Columbus, Chicago and Indiana Central Railway Company and the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company have neglected and refused to pay the coupons due upon each of the bonds described in the petition, being coupons from and including coupons maturing May 1, 1879, to and including coupons maturing May 1, 1892, the last two of which fell due since the commencement of this suit.

On the 1st day of October, 1890, the Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company made its mortgage to the Farmers' Loan and Trust Company of New York, and to W. N. Jackson of Indiana, as trustee, for the purpose of securing an issue of bonds to be made by that company to amount in the total to 75,000 bonds at the par value of $1000 each, to be issued as in said mortgage set out, and upon the property described in the answer and cross-petition of the said Farmers' Loan and Trust Company filed in this cause, including the line of railroad and other property connected therewith, described in the petition of the plaintiff herein; that said mortgage was duly recorded as required by law in all of the counties in the several States through or into which that line runs; that by virtue of that mortgage there have been issued bonds to the total number of 5318, being the bonds numbered from 1501 to 6818, both inclusive, and amounting in the total to $5,318,000; and that said bonds are now outstanding and in full force, and no default has been made in the payment of interest thereon.

As conclusions of law from the foregoing facts, the court of common pleas found the equities of the case in favor of Lynde. It held that the 36 bonds and the coupons thereto annexed were the valid and binding obligations of the Columbus and Indianapolis Central Railway Company and of the Columbus, Chicago and Indiana Central Railway Company; that Lynde was the owner and holder of those bonds and coupons, and each of them, as well as the coupons that accrued May 1, 1879, to May 1, 1891, inclusive; that there was due to him on such coupons, down to the entry of the decree, the sum of $47,673.37; and that under and by virtue of the said mortgage or deed of trust described in the petition Lynde had a valid and subsisting lien, to secure said bonds and coupons, upon the railroad property described in the petition as of November 1, 1864, and was entitled to a decree for the payment of the sum so found due. A decree was subsequently entered in conformity to these conclusions. Upon a writ of error to the Circuit Court of Franklin County that judgment was affirmed. The judgment of the latter court was

also affirmed upon writ of error to the Supreme Court of Ohio.

While the cause was pending in the Supreme Court of the State, Lynde died, and the Long Island Loan and Trust Company qualified as his executor.

The first question to be considered relates to the jurisdiction of this court to review the final judgment of the Supreme Court of Ohio.

The contention of the defendant in error is that the record presents no Federal question which this court will review; and that the state court based its decision upon an independent ground, not involving a Federal question, but depending upon principles of general law and broad enough to sustain its judgment. Its further contention is that the Supreme Court of Ohio rightly held that neither Lynde nor the trustee, Parkhurst, were affected by the proceedings in the foreclosure suits instituted in the Circuit Courts of the United States

Upon looking into the record, we find that the defendant railway company claimed in its answer that if a lien at any time attached to the property in question to secure the 36 bonds purchased by Lynde, such lien was wholly divested and discharged by the above proceedings in the Federal courts under which that company claims title. This, it would seem, was such an assertion of a right and title under an "authority exercised under the United States" as gives this court jurisdiction to reëxamine the final judgment of the state court. Rev. Stat. § 709.

In *Dupasseur* v. *Rochereau*, 21 Wall. 130, 134, 135, — which was a suit to subject certain lands in satisfaction of a debt secured by mortgage, and for the amount of which debt judgment had been obtained, — the defence was rested upon the ground that the defendant purchased the property at a sale made under a judgment of the Circuit Court of the United States for the Eastern District of Louisiana, in a named case, "free of all mortgages and incumbrances and especially from the alleged mortgage of the plaintiff." This defence was not recognized by the Supreme Court of Louisiana, and the case was brought to this court by writ of error. One of the ques-

tions considered was as to the jurisdiction of this court under the act of February 5, 1867, which gives a writ of error to the highest court of a State in which a decision in the suit could be had, "where any title, right, privilege or immunity is claimed under or authority exercised under the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed under . . . such authority." Rev. Stat. § 709; act of February 5, 1867, c. 28, 14 Stat. 385. Mr. Justice Bradley, delivering the opinion of the court, said: "Where a state court refuses to give effect to the judgment of a court of the United States rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which under the act of 1867 may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States establishing the Circuit Court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the Constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the state courts." Having disposed of the question of jurisdiction, the court then inquired whether the state court, in overruling the defence, had given proper validity and effect to the judgment of the Circuit Court of the United States. Upon this point the court said: "The only effect that can be justly claimed for the judgment in the Circuit Court of the United States is such as would belong to judgments of the state courts rendered under similar circumstances. Dupasseur & Co. were citizens of France, and brought the suit in the Circuit Court of the United States as such citizens; and, consequently, that court, deriving its jurisdiction solely from the citizenship of the parties, was in the exercise of jurisdiction to administer the laws of the State, and its proceedings were had in accordance with the forms and course of proceeding in the state courts. It is apparent, therefore, that no higher sanctity or effect can be claimed for the judgment of the

Circuit Court of the United States rendered in such a case under such circumstances than is due to the judgments of the state courts in a like case and under similar circumstances. If by the laws of the State a judgment like that rendered by the Circuit Court would have had a binding effect as against Rochereau, if it had been rendered in a state court, then it should have the same effect, being rendered by the Circuit Court. If such effect is not conceded to it, but is refused, then due validity and effect are not given to it, and a case is made for the interposition of the power of reversal conferred upon this court. We are bound to inquire, therefore, whether the judgment of the Circuit Court thus brought in question would have had the effect of binding and concluding Rochereau if it had been rendered in a state court. We have examined this question with some care, and have come to the conclusion that it would not."

The same question was again before this court in *Crescent Live Stock Co.* v. *Butchers' Union*, 120 U. S. 141, 146, which was an action for malicious prosecution, the defence being that the existence of probable cause had been previously determined by a judgment in the Circuit Court of the United States. It was contended that the Supreme Court of the State failed to give proper effect to that judgment, and thereby denied to the defendant a right arising under the authority of the United States. The case came here upon writ of error, and the jurisdiction of this court to review the final judgment was sustained. Mr. Justice Matthews, speaking for the court, said: "It must, therefore, be conceded that the sole question to be determined is, did the Supreme Court of Louisiana, in deciding against the plaintiffs in error, give proper effect to the decree of the Circuit Court of the United States, subsequently reversed by this court? It is argued by counsel for the defendant in error that this does not embrace any Federal question; that the effect to be given to a judgment or decree of the Circuit Court of the United States sitting in Louisiana by the courts of that State is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the state court is final;

and that the ruling in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the Constitution or laws of the United States.' But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the Constitution and laws of the United States, and comes within the jurisdiction of the Federal courts by proper process, although, as was said by this court in *Dupasseur* v. *Rochereau*, 21 Wall. 130, 135, 'no higher sanctity or effect can be claimed for the judgment of the Circuit Court of the United States rendered in a like case, under similar circumstances.' *Embry* v. *Palmer*, 107 U. S. 3. It may be conceded, then, that the judgments and decrees of the Circuit Court of the United States, sitting in a particular State, in the courts of that State, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the Supreme Court of Louisiana to the decrees of the Circuit Court of the United States here drawn in question. The decree of the Circuit Court was relied upon in the state court as a complete defence to the action for malicious prosecution, on the ground that it was conclusive proof of probable cause. The Supreme Court of Louisiana, affirming the judgment of the inferior state court, denied to it, not only the effect claimed, but any effect whatever."

According to these decisions and in view of the statute giving this court authority to reëxamine the final judgment of the highest court of a State denying a right specially set up or claimed under an authority exercised under the United States, it is clear that we have jurisdiction to inquire whether due effect was accorded to the foreclosure proceedings in the Circuit Courts of the United States under which the plaintiff in error claims title to the lands and property in question.

The plaintiff in error contends that the state court did not give due effect to the decrees of the Circuit Courts of the United States in the suits instituted by Roosevelt and Fos-

dick, in that it did not recognize as paramount the rights acquired under those decrees by the purchasers of the property in question, but postponed or subordinated those rights to a lien upon such property which, it is alleged, was created or attempted to be created, while those suits were pending, and while the property was in the actual custody of those courts, by receivers, for purposes of being administered.

Did Lynde, under the circumstances stated in the finding of facts, acquire a good title, as between himself and the mortgagor company, and the companies which succeeded it by consolidation, to the 36 bonds purchased by him from Newbold & Son, as well as the right to claim the benefit of the mortgage executed to Parkhurst? Referring to the facts recited in the finding, the Supreme Court of Ohio said: "Plaintiff in error contends, among other things, that the facts thus stated show that neither the maker of these bonds nor the consolidated companies into which it became merged consented to the sale or delivery of the bonds, and as an owner cannot be deprived of his property without his consent, no title passed. It is true that these bonds were negotiated to Newbold & Son without the knowledge or consent of the company; but such consent and knowledge is not indispensable to pass the title to negotiable instruments. Where this class of paper, complete in form and transmissible by delivery, is placed by the maker or owner in the custody of one who is thereby clothed with an apparent power of disposition, and the custodian avails himself of the opportunity thus afforded him to negotiate it to an innocent party, the title of the holder is not to be tested by principles applicable to stolen securities, but by principles properly applicable to the transaction as it actually occurred. That the title to negotiable securities may pass by virtue of such a transaction as the finding of fact shows occurred in respect to the negotiation of the bonds in question is, we think, clear upon principle and sustained by authority. *Railway Co.* v. *Sprague*, 103 U. S. 756; *Fearing* v. *Clark*, 16 Gray, 74. Independently of the rules of law designed to protect and give currency to negotiable paper, those principles of natural justice univer-

sally applicable to the affairs of mankind, when applied to this transaction, would seem to demand the protection of the defendant in error as against the maker of the bonds and all who stand in its shoes. He was wholly free from fault in connection with the transaction. Each bond contained a declaration of its transmissibility from hand to hand by mere delivery. He found them for sale, before they were due, in the market, where such securities are usually offered for sale, and bought them at their fair market value without notice of any infirmity in their title. Soon thereafter he took them to the Union Trust Company, in New York city, the agents of the makers, specially appointed to register its bonds, and caused them to be registered in his name on its books. What more could even the highest degree of prudence or diligence demand of him? The maker of the bonds, a railway company, capable of acting through agents only, placed these bonds in the custody of its president, an agent clothed with high, though possibly not clearly defined, powers. The bonds were perfect obligations, bearing on their face a certificate of authentication by the trustee, and containing an express declaration of their transmissibility from hand to hand by mere delivery. He was up to, and long after the time these bonds were negotiated, continued as president of the different consolidated companies as they were successively formed. The companies thus held him out to the world as one who could be trusted to transact matters of importance. Under these circumstances what can be found tending to excite a doubt in the most cautious mind respecting his power to dispose of bonds so entrusted to him? If the maker of these bonds and those who must abide by its title can shift the responsibility and consequent loss resulting from this transaction from themselves to the holder of the bonds, it must be by the application of some stern rule of law founded upon considerations of public policy." 55 Ohio St. 23, 45.

The state court adjudged that there was no rule of law arising out of the public policy of the State, as manifested by state legislation, that required it to deny to the holders of these bonds the rights and privileges pertaining to commer-

cial paper purchased in good faith in the ordinary course of business.

Assuming that this question of general law was correctly determined by that court, we are now to inquire what effect, if any, the proceedings in the foreclosure suits instituted by Roosevelt and Fosdick in the Circuit Courts of the United States had upon the right of Lynde, as the *bona fide* holder of the 36 bonds, to the security furnished by the Parkhurst mortgage?

We have seen that when Lynde purchased the 36 bonds, to secure which, with other bonds, the Parkhurst mortgage had been previously executed, the property described in that mortgage and here in question was in the actual custody of the Circuit Courts of the United States by receivers appointed in the foreclosure suits brought by Roosevelt and Fosdick. The contention of the plaintiff in error is that the property was a fund in those courts to abide the event of the litigation in them, and that, pending the proceedings in those courts and their actual possession of the property, it was impossible that Lynde, by purchasing the 36 bonds, could have acquired any lien thereon which the law would recognize and enforce.

The principal authority cited in support of this contention is *Wiswall* v. *Sampson*, 14 How. 52, 68, in which it was held that while real estate is "in the custody of the court as a fund to abide the result of a suit pending, no sale of the property can take place, either on execution or otherwise, without the leave of the court for that purpose." If the rule were otherwise, the court said, the whole fund might pass from its hands before final decree, and the litigation become fruitless. We do not perceive that the principle announced in *Wiswall* v. *Sampson* controls the determination of the present case. If there had been any attempt by suit to enforce the lien given by the Parkhurst mortgage by an actual sale of the property in question pending the proceedings in the foreclosure suits, it may be that the principle announced in that case could have been invoked, and the sale would have been ineffectual to pass title to the purchaser. But nothing was done by Lynde, after the institution of the foreclosure suits and pending proceedings

therein, which was inconsistent with or tended to defeat the object of those suits. He only purchased the bonds in question, and such purchase was not hostile to the possession by the Circuit Courts in the foreclosure suits of the property mortgaged to secure them, simply because by such purchase he succeeded to an interest in the Parkhurst mortgage. The foreclosure suits proceeded to a final decree without any attempt to interfere with the custody and control of the property for the purposes avowed in those suits; for the bill filed by Roosevelt and Fosdick showed, upon its face, that no relief was asked as against the Parkhurst mortgage, or the bonds secured by it. It was distinctly found, and it is not disputed, that the Roosevelt-Fosdick suits were for the foreclosure of the mortgage in which they were named as trustees, "but not affecting the Parkhurst mortgage aforesaid or the bonds thereby secured." And by the final decree in those suits the mortgaged property was directed to be sold subject to the outstanding bonds prior in lien to the Roosevelt-Fosdick mortgage, and to all other if any paramount liens thereon. The Parkhurst mortgage was prior in date to the Roosevelt-Fosdick mortgage; and the decree in the foreclosure suits expressly declared that nothing contained in it should "in any manner affect, prejudice or preclude the holders of said paramount liens or any of them, but that said decree should be without prejudice to the rights of them and each of them." Thus the decree expressly saved the rights of those who held bonds secured by mortgage prior in date to the mortgage to Roosevelt and Fosdick. It bound only the defendants in the foreclosure suits, and all persons claiming or to claim under them or any of them, subsequent to the institution of those suits. Strictly speaking, the lien that attended the 36 bonds purchased by Lynde did not arise after the institution of the foreclosure suits, although Lynde's purchase was pending the proceedings in those suits, and while the property was in the hands of receivers. That lien had its origin in the execution and delivery of the Parkhurst mortgage and the authentication by the trustee of the bonds named in it, and when any of those bonds became the property of a *bona fide*

holder, the lien given to secure them related back to the date of the mortgage, which was long prior to the institution of the foreclosure suits. Besides, Parkhurst, the trustee in the prior mortgage, was not made a party to the foreclosure suits, and neither he nor those whose interests he was appointed to represent were bound by the decree or any of its provisions. The rule is well settled that a sale of real estate under judicial proceedings concludes no one who is not in some form a party to such proceedings. *United Lines Telegraph Co.* v. *Boston Deposit & Trust Co.*, 147 U. S. 431, 448. It would seem, therefore, clear that the pendency of the foreclosure suits did not interfere with the negotiation or transfer of the bonds secured by the prior Parkhurst mortgage, nor did the decree in those suits impair in any degree the lien created by the Parkhurst mortgage, which antedated the mortgage to Roosevelt and Fosdick. The mere purchase of the 36 bonds by Lynde, and the acquisition by him in consequence of such purchase of an interest in the Parkhurst mortgage, cannot be regarded as hostile to the possession taken by the Circuit Courts of the United States of the property embraced by the Roosevelt-Fosdick mortgage for the purpose of selling it in satisfaction of the debts secured by that mortgage, but subject to prior paramount liens, such as the lien created by the Parkhurst mortgage.

We are of opinion, for the reasons stated, that the state court did not fail to give due effect to the several decrees in the Circuit Courts of the United States in the foreclosure suits instituted by Roosevelt and Fosdick, when it held that those decrees did not prevent the defendant in error from claiming the benefit of the lien created by the mortgage to Parkhurst to secure the payment of the bonds purchased by Lynde from Newbold & Son.

The judgment below is

Affirmed.